

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

N.V.E., INC.

Plaintiff,

v.

JESUS J. PALMERONI, a/k/a JOSEPH  
PALMERONI, VINCENT ROSARBO, NATIONAL  
RETAIL CONSULTING GROUP, INC., AMERICAN :  
WHOLESALE DISTRIBUTION, INC., GLOBAL  
MARKETING & SALES GROUP, LLC, and :  
VAR CONSULTING, INC., :

Defendants.

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Newark, New Jersey  
January 23, 2020

BEFORE:

THE HON. MADELINE COX ARLEO, U.S.D.J.

Reported by:  
CHARLES P. McGUIRE, C.C.R.  
Official Court Reporter

Proceedings recorded by mechanical stenography; transcript  
produced by computer-aided transcription.

**APPEARANCES:**

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**Pro se**

1 THE COURT CLERK: All rise.

2 THE COURT: All right. Good afternoon, everyone.

3 MR. SAMARO: Good afternoon, Your Honor.

4 THE COURT: Okay. We're here for N.V.E. v.

5 Palmeroni.

6 Could I have appearances, please?

7 MR. SAMARO: Good afternoon, Your Honor.

8 Samuel J. Samaro of the law firm of Pashman Stein

9 Walder Hayden on behalf of N.V.E.

10 THE COURT: Okay.

11 MR. BOYAN: James Boyan of Pashman Stein Walder

12 Hayden, also on behalf of N.V.E.

13 THE COURT: Okay.

14 MR. PALMERONI: Jesus Palmeroni, pro se.

15 THE COURT: Okay.

16 MR. ROSARBO: Vincent Rosarbo, also pro se.

17 THE COURT: All right. Everyone, have a seat.

18 All right. So, what I wanted to do was go through  
19 these in limine motions and make sure everyone was ready to  
20 go forward with the trial.

21 I know that one of -- is it Mr. Rosarbo who has  
22 the issue?

23 MR. ROSARBO: Yes, Your Honor.

24 THE COURT: Okay. So, tell me. I know you wrote  
25 me a letter that you have an issue with your brother. I'm

1 very sorry for his situation and will certainly accommodate  
2 you in a reasonable way.

3 Could you give me any update as to his status in  
4 your need to be with him?

5 You can stand.

6 MR. ROSARBO: Excuse me, Your Honor, I'm sorry.

7 Well, he was initially diagnosed with stage four  
8 small cell lung cancer, which is an aggressive lung cancer,  
9 and it has spread since then into his bones and his brain  
10 and also into his liver.

11 What they have done is, the protocol is to give  
12 him a series of radiation treatments, followed by chemo  
13 treatments, and then re-evaluate and then see if they took,  
14 or if it's a choice of putting him into a -- we call it a  
15 hospice, that just makes him comfortable until his life  
16 passes on.

17 My reasons for all this is, I'm the only person  
18 that he has to deal with. My mother, father, and sister  
19 both passed. I'm his legal guardian.

20 THE COURT: Does he have any children, or a wife?

21 MR. ROSARBO: No.

22 THE COURT: Partner?

23 MR. ROSARBO: He's been autistic from birth, so he  
24 doesn't understand quite a few things. He's lost quite a  
25 bit of weight.

1 THE COURT: Who did he live with before this all  
2 happened?

3 MR. ROSARBO: He lived with himself. He was  
4 self-sufficient as far as taking the bus, cooking for  
5 himself, cleaning.

6 THE COURT: Did he work? Did he have a job?

7 MR. ROSARBO: No. No. He can't. He's on Social  
8 Security disability.

9 THE COURT: Okay.

10 MR. ROSARBO: He's on state grants. So I took  
11 care of the bills. But he had no problem, other than what  
12 just happened.

13 THE COURT: And no children, I take it.

14 MR. ROSARBO: No, none. And he's lost quite a bit  
15 of weight. I go and see him one or two times a day. I feed  
16 him.

17 THE COURT: Is he in a nursing home or a hospital?

18 MR. ROSARBO: No, he's in the hospital right now.

19 He knows he's sick. I don't think he understands  
20 the graveness of it. That's all on the doctors and us.

21 And what I'm trying to say is that at this point  
22 in time, I'm stuck in the situation that if I have to make a  
23 choice, I can't leave him and make the choice to do what I  
24 have to do here. I won't be able to do both at the same  
25 time.

1 THE COURT: When did they start his treatment?

2 MR. ROSARBO: Oh, he's been in the hospital a  
3 month. They started his treatment two weeks ago as far as  
4 radiation's concerned. He has to build up another week or  
5 so to even attempt chemo.

6 Today, I was supposed to have a family meeting.  
7 It was canceled till tomorrow. I had to come here.

8 THE COURT: Got it.

9 MR. ROSARBO: And I'll get a bigger update then.

10 But what I'm trying to say is, the reason why I  
11 put in the extension for that time frame is, I'll definitely  
12 know one way or the other whether it has taken, slowed it  
13 down, or nothing has happened, and I'll have a choice to  
14 make at that point. I can't make that choice now.

15 THE COURT: I'll hear from Plaintiff's counsel.

16 What I'm thinking about doing, certainly if you're  
17 the primary caretaker for a special-needs family member who  
18 has no one else and is in the last stages of life, I'm not  
19 going to start the trial until --

20 MR. ROSARBO: Thank you, Your Honor.

21 THE COURT: -- that issue is concluded.

22 But I'd like to set a trial date, perhaps in  
23 March, and if you're still involved with your brother in  
24 March, we'll have a telephone call in February, and you can  
25 send us an update letter before then, or call my chambers,

1 or send a letter would even be better because then we could  
2 send it to everyone, I could have it e-filed, and if he  
3 still needs your guidance and care, then I could kick it  
4 again after that, based on what you tell me. So we can even  
5 set it down for a telephone call so you can have a number to  
6 call in at the end of February, and we'll keep it in March,  
7 for a lot of reasons. Number one, I think it's the right  
8 thing to do in a civil matter that's old as it is, and,  
9 number two, I wouldn't want to start and then halfway  
10 through a trial have to declare a mistrial because you tell  
11 me he passed away or he got worse and you have to be with  
12 him and you have to do funeral arrangements, and then we  
13 have a situation where I have to declare a mistrial, and  
14 then Mr. Occhifinto, his counsel, Mr. Palmeroni, we'll all  
15 have to start over again, and that's not fair, either, and  
16 the Court wastes its time.

17 So, I'll pick a firm date and I will do it as  
18 firmly as we can under the circumstances, and we'll just see  
19 how it goes from here.

20 MR. ROSARBO: Thank you, Your Honor.

21 THE COURT: But what I'd like to do is go through  
22 these motions, have everything ready, and make sure that we  
23 know we need witnesses ready and what the parameters of the  
24 trial are. Okay?

25 Anything you want to add, Mr. Samaro?

1           MR. SAMARO: Only that in light -- I would never  
2           oppose such a request, and we did not oppose the request;  
3           but, in reliance upon the trial date that you did schedule,  
4           Your Honor, I scheduled a family vacation beginning on the  
5           14th of March.

6           THE COURT: I will not stand in the way of family  
7           vacations.

8           MR. SAMARO: I'm sorry, Your Honor?

9           THE COURT: I will not stand in the way of family  
10          vacations.

11          MR. SAMARO: So, Your Honor, as long as it starts  
12          -- if it starts the 23rd, that will be fine. My vacation is  
13          supposed to start on the 14th.

14          THE COURT: That's perfect. We'll do it --  
15          actually, you don't want to come back -- maybe we'll start  
16          on March 24th.

17          MR. SAMARO: That would be great, Judge. Thank  
18          you.

19          THE COURT: That gives you a day to get ready.  
20          And there will be jury selection to start with anyway.

21          All right. So that's what we're going to do.  
22          We'll tentatively schedule it for the 24th.

23          Before Mr. Samaro goes on vacation on the 14th,  
24          we're going to have a telephone call on March 10th at -- do  
25          we have a time?



1 THE COURT CLERK: Three o'clock.

2 THE COURT: Let's do four in case I want to put  
3 something in in the afternoon.

4 March 10th at 4 p.m.

5 I'm going to ask if Mr. Samaro could initiate the  
6 call.

7 MR. SAMARO: Will do, Your Honor.

8 THE COURT: And before you leave, we have a  
9 sign-in sheet; I'll make you a copy. Are the phone numbers  
10 of Mr. Palmeroni and Mr. Rosarbo provided? Are they cell  
11 phones?

12 MR. ROSARBO: Yes, Your Honor.

13 THE COURT: Okay. So, what we'll do is, put in  
14 your calendar March 10th at four o'clock, so you won't have  
15 to come into Newark again. Mr. Samaro will initiate a  
16 telephone call. He will give you a call. I'll give him a  
17 copy of the sheet, or he'll just call you in, and then we'll  
18 have a telephone call for the sole purpose of finalizing the  
19 trial date, whether it goes forward on the 24th or whether  
20 we need a further adjournment, so then Mr. Samaro has  
21 finality and understanding before he goes on vacation.  
22 Okay?

23 MR. ROSARBO: Thank you, Your Honor.

24 THE COURT: All right.

25 So, there is a number of motions that have been

1 filed, and we'll go through them in order.

2 I want to begin with the motion to reconsider the  
3 ruling of the prior District Court judge on the issue of the  
4 adverse inference, and I read the papers, and I understand  
5 the issues.

6 I will tell you what I'm going to do first, and  
7 then I'm going tell you why.

8 This case has a long history, it has an '06  
9 docket, and I got involved in this case I guess in '15,  
10 having gone through the motions to dismiss, summary  
11 judgment, lots of discovery.

12 But there were rulings made back in I think it was  
13 2010 by a different District Court judge on the issue of  
14 spoliation of evidence that appears to stem from the failure  
15 to preserve some electronic discovery in the possession of  
16 N.V.E.

17 The prior judge found that there was spoliation  
18 based on gross negligence, and that gross negligence finding  
19 was predicated, in part, on not having a litigation hold in  
20 place back in '06, I guess it was, at the time that they  
21 were on notice of this potential litigation.

22 Since that time, in '15, the law has changed. The  
23 rule speaks now to, spoliation, adverse inferences should  
24 only be given where there's intentional conduct, not any  
25 form of negligence, and the comments by Chief Judge Roberts

1 give some latitude for courts to provide that inference or  
2 to decide whether or not to apply the new heightened  
3 standard for cases that had not been decided -- strike that  
4 -- where the conduct occurred before the new evidence  
5 ruling, and gave a fair amount of discretion to the District  
6 Court in whether to apply it retroactively or not. I think  
7 the comment says that the rule change takes effect on  
8 December 1, 2015, and "shall govern all proceedings in civil  
9 cases thereafter commenced, and, insofar as just and  
10 practical, all proceedings then pending."

11 What makes this case a little bit different is  
12 that the issue is raised and resolved before the rule  
13 change, and the Plaintiff did not ask the Court to  
14 reconsider it until the motions that were filed in December  
15 of 2019, and I'm also mindful that the opponents to this  
16 motion are pro ses.

17 So here's what I'm inclined to do, and I am  
18 inclined to carry the motion until the close of the evidence  
19 so I have a better sense of whether these documents that  
20 were allegedly destroyed, or not preserved, I should say, go  
21 to damages, whether they go to liability, whether it makes  
22 sense, having heard all the evidence and understanding the  
23 importance of those documents in context, whether I should  
24 revisit that ruling.

25 MR. SAMARO: May I, Your Honor?

1 THE COURT: Sure.

2 MR. SAMARO: That sounds fine to me. The problem  
3 there, I think, is that if Your Honor were of a mind to  
4 simply deny the motion, then in our case-in-chief, we would  
5 have witnesses on this question, because the jury is left  
6 with the --

7 THE COURT: Well, tell me what the documents are  
8 that are at issue.

9 MR. SAMARO: Well, so that's the thing: It's  
10 never been clear, to Your Honor.

11 THE COURT: To me, either. So that's why -- it's  
12 hard to give an adverse inference -- I don't even know --  
13 all I know, from what I read of the District Court's  
14 opinion, is that there were some electronic documents that  
15 were not preserved after a litigation hold. That's all I  
16 know. So, I wouldn't even know: Does it go to their  
17 defenses to damages -- because it's the Defendants that are  
18 claiming litigation hold -- or defenses to liability?

19 MR. SAMARO: So, Your Honor, the case is filed in  
20 '06. The parties begin discovery, including document  
21 discovery, around 2007.

22 Earling Jensen is here today. He is the in-house  
23 guy -- not a lawyer, but he is the CFO who, with my guidance  
24 and instructions and the guidance and instructions of an  
25 in-house lawyer, is gathering the documents that are

1 responsive to the discovery request, and that happens over  
2 the course of a year, a year and a half, something like  
3 that.

4 Mind you, at this time, files --

5 THE COURT: We're talking about back in '07.

6 MR. SAMARO: Yes. Yes, Your Honor.

7 So, in that period of time, files are mostly paper  
8 files. You know, some of it is electronic, but in those  
9 days, we were dealing with paper. And so Mr. Jensen went  
10 through all the documents they had, pulled all the records  
11 that were responsive, and then they were produced.

12 Fast forward to 2009. After this has all  
13 happened, Mr. Jensen begins to throw some of those documents  
14 out because they're no longer needed. Not the ones that are  
15 produced; the ones that he did not deem relevant at the  
16 time.

17 So, what winds up happening is, the other side  
18 finds out that records have been destroyed, and these  
19 motions for spoliation are filed. But no one has ever  
20 established that anything evidential was lost. And that's  
21 the absolute truth, which is why --

22 THE COURT: Can I ask you a question?

23 MR. SAMARO: Yes.

24 THE COURT: Because, in looking at the rule change  
25 -- and it has to do with electronically stored

1 information --

2 MR. SAMARO: Right.

3 THE COURT: -- was this electronically stored  
4 information?

5 MR. SAMARO: It was, Your Honor. It was stored on  
6 a system. It was called the Mac system. So it was both  
7 stored on that computer system, and every single piece of  
8 paper as far as we knew was also stored in paper form in a  
9 file.

10 And so what winds up happening is, in 2005 into  
11 2006, they convert to a new computer program. So the old  
12 system was called the Mac system, and the new system was  
13 called something else -- which my colleague can help me  
14 with, if necessary -- the MAF 200.

15 So, apparently, this Mac thing is -- the Mac  
16 system is a really old computer program that over time --  
17 and we've had it ever since. It was never -- all of the  
18 documents were stored on that thing, it was never destroyed.  
19 But, years later, when all of this came up, we couldn't find  
20 anybody who could actually go into the system and reproduce  
21 the documents stored there. Nobody denies that -- we didn't  
22 throw that thing out. We just can't -- it's -- whatever,  
23 it's so old that nobody -- we would have to spend a lot of  
24 money to do it. They tried to find a couple of people who  
25 could do it; they could not. It was offered to them to do,

1 and nobody on that side did it.

2 So, we have the computer where all of the  
3 documents were stored --

4 THE COURT: Were they switched from Mac to the new  
5 system? Were they transferred?

6 MR. SAMARO: So -- they were not. I mean, I guess  
7 they started fresh.

8 These are like orders. These are invoices, you  
9 know, these are business records on an ongoing basis. So  
10 they did not transfer the records. PDF --

11 THE COURT: But have the paper copies of whatever  
12 is on Mac, and when the documents were requested in '07-'08,  
13 were they turned over?

14 MR. SAMARO: Yes.

15 THE COURT: Do you have those invoice records?

16 MR. SAMARO: Yes. All of the things that were  
17 relevant at the time, right, because, 2006, it was one case,  
18 it was just about the kickback scheme. We didn't know about  
19 this whole distribution thing until 2010 into 2011, when the  
20 complaint was amended. So anything that was relevant back  
21 in 2006 was both preserved and produced. No one has ever  
22 been able to say what document was lost, because no  
23 documents were lost.

24 Judge Salas was very concerned because we did not  
25 do a litigation hold letter and because I didn't personally

1 go down to supervise the collection of these documents, but,  
2 frankly, there was in-house counsel. In those days -- we do  
3 it now, but in those days, this was not something that was  
4 done routinely.

5 And so there is no -- as far as we know,  
6 everything that was responsive to the requests at that time  
7 was preserved and produced, and no one has ever pointed to a  
8 document --

9 THE COURT: At that time, it was the kickback  
10 scheme that was --

11 MR. SAMARO: That's right, Your Honor.

12 THE COURT: So, from what I understand about the  
13 distribution scheme, it would seem that the documents that  
14 support the distribution scheme would be uniquely in the  
15 possession of the Defendants, not in the possession of --

16 MR. SAMARO: True, and -- well, right, and --  
17 well, so what they were doing would be in their possession.  
18 We would have had more of the invoicing and so on, which  
19 would have helped us greatly with damages. I mean, we had  
20 to revise our damage theory because we didn't have some of  
21 those records, and again, it's because we didn't know  
22 anything about this until after 2009.

23 So whatever was responsive was found and produced,  
24 and no one has ever established otherwise.

25 And so what we will need to do is, I'll have to



1 call Earling and other witnesses to come in and explain all  
2 of this at some point to the jury if they will be offered  
3 the opportunity to infer that maybe we did something  
4 intentionally.

5 And so Your Honor's procedure is fine, except it  
6 sort of anticipates a bifurcation, because, if Your Honor  
7 were of a mind to give that charge, then I would have to put  
8 on testimony about all of the things I just said.

9 THE COURT: Mr. -- is it Palmeroni?

10 MR. PALMERONI: Yes, Your Honor.

11 THE COURT: Okay. So let me focus you on your  
12 response.

13 What if any documents were you unable to obtain as  
14 a result of this inability to preserve documents?

15 MR. PALMERONI: As Judge Salas said, N.V.E. wasn't  
16 able to quantify everything that was destroyed.

17 THE COURT: Give me an idea.

18 MR. PALMERONI: Sure. Absolutely.

19 THE COURT: Let me put it in context. You worked  
20 for the company. What was your title?

21 MR. PALMERONI: Eventually, vice president of  
22 sales.

23 THE COURT: Okay. So you were vice president.

24 MR. PALMERONI: Yes.

25 THE COURT: So you knew what kind of documents

1       were stored.

2               MR. PALMERONI: Absolutely.

3               THE COURT: You got a lot of documents that were  
4       produced in paper form. Tell me what documents you were  
5       unable to obtain as a result of the documents not being  
6       preserved and stuck in the Mac computer system.

7               MR. PALMERONI: Absolutely, Your Honor.

8               First of all, being there seven years, I'd like to  
9       weigh in on exactly how these documents were produced in the  
10      first place, because that's important.

11              When an order would come in -- I'm going to speed  
12      through it. When an order would come in, there would be  
13      paper copies, and they would be inputted into the Mac  
14      system. The Mac system had holds throughout it where things  
15      had to be approved all the way to accounting. Nothing could  
16      be released down to shipping. It was supposedly state of  
17      the art at the time.

18              Because Mr. Occhifinto did not believe in  
19      computers, he made sure that everything was in triplicate on  
20      paper copy, both upstairs, outside of my office in the  
21      secretarial pool, as well as downstairs in shipping, far,  
22      far away, you know, a quarter mile away. They had to have  
23      it in triplicate.

24              What was contained in there was all of the  
25      shipments that we're talking about in the time that they

1 brought this case; the pricing, which goes to the heart of  
2 this case, goes to the heart of the case as far as the  
3 so-called distribution scheme.

4 THE COURT: Let me stop you for a minute.

5 The wrongful conduct, the alleged wrongful conduct  
6 that is the subject of the complaint with respect to the  
7 distribution scheme; when did it go from? What's your case  
8 from, Mr. Samaro? What year to what year?

9 MR. SAMARO: So the case is from 2000 on, Your  
10 Honor.

11 THE COURT: Till when?

12 MR. SAMARO: To 2006, right? 2006?

13 THE COURT: Okay. All right. So -- and I'm going  
14 to get right back to Mr. Palmeroni. What if any shipment  
15 records and pricing records were produced for 2000 to 2006?

16 MR. SAMARO: So we're missing pricing records from  
17 that period of time because, again, these were not the  
18 documents that were relevant until 2011, when we amended the  
19 complaint, when we had figured out this distribution scheme.  
20 At the time that we were producing documents and Mr. Jensen  
21 was looking for documents, these were not issues in the  
22 case. We never thought that they would be issues. We  
23 served a lot of subpoenas on banks, and that's how we were  
24 able to reconstruct the other part of this fraud, but we  
25 didn't know it at the time, Judge.

1           THE COURT: How did you reconstruct the pricing?  
2           In other words, isn't your whole case that the product was  
3           shipped through the European affiliate and purchased through  
4           them and then rerouted through this new company that they  
5           designed, and they sold it to your customers?

6           MR. SAMARO: It is, Your Honor. So, our damages  
7           theory is disgorgement. We can prove to the last nickel how  
8           much they made through this scheme.

9           THE COURT: How?

10          MR. ROSARBO: Because we have all of the tax  
11          records. We have all of the checks.

12          THE COURT: Whose tax records?

13          MR. SAMARO: Theirs, the tax records for them  
14          individually, the tax records for their company.

15          See, they ran all of this through companies, and  
16          then formed these companies on the side that collected the  
17          checks from the sales of this product. And we've taken  
18          their depositions. Every nickel that they made through  
19          those companies was by selling this diverted product. And  
20          so we know exactly what their profit was, and that's all  
21          we're asking for. If we had those records, we would be  
22          asking for lost profit, which would be the amount we would  
23          have sold the products for, but we can't because we don't  
24          have those records. We know -- you know, we have  
25          approximately --

1 THE COURT: And that would be higher.

2 MR. SAMARO: That would be much higher. It would  
3 be double what we're able to establish now.

4 THE COURT: Okay. Go ahead, Mr. Palmeroni.

5 MR. PALMERONI: Okay.

6 As Mr. Samaro just so succinctly stated, all of  
7 the records for pricing and billing at that time are  
8 missing, so they constructed a very convenient theory. What  
9 the Court may not be aware of as Your Honor was not on the  
10 case at that time is, they first made an amended complaint  
11 that all of this product was stolen and counterfeited. When  
12 my attorneys, who could not get ahold of Mr. Rosarbo,  
13 finally got ahold of records that were turned over from  
14 Mr. Rosarbo and then put into evidence by Mr. Samaro, we  
15 found over \$12 million in cash payments that were made  
16 directly from Mr. Rosarbo to N.V.E.

17 At that time, we said, we need to -- we're going  
18 to go for court sanctions here. You're saying these things  
19 were stolen and et cetera, stolen and counterfeited. We  
20 need to pull that amended complaint, which they did, and  
21 then came back with the theory that they were wrong in a way  
22 that things were sold below.

23 If Your Honor would, I have a memorandum that I  
24 just discovered -- well, that was given to me that outlines  
25 the different pricing that was occurring, and this is from

1 another employee at N.V.E. writing something to  
2 Mr. Occhifinto and myself about the disparate pricing all  
3 over the place.

4 They claim that these things were being sold at  
5 this crazy price. What they don't tell you is that Ephedra  
6 was the main product. Ephedra was about to be outlawed.  
7 Mr. Occhifinto has been called in front of Congress to  
8 testify, as well as other large companies that were  
9 marketing this, and, although no one knew the hour of the  
10 day -- the hour or the day that this would happen, it was  
11 imminent, and it did happen. And anybody that knew, as  
12 Mr. Occhifinto did, the president of N.V.E., because he had  
13 been through something similar before, anybody that was  
14 involved in this knew that when the Feds came down, the  
15 Federal Government came down and said this would no longer  
16 be sold, you were going to be stuck with it, okay? Zero.  
17 Nothing.

18 He had tens of millions of doses, of raw product  
19 doses in his warehouse. He was selling it at any price  
20 because our economies of scale were different than any other  
21 company. We were vertically integrated. We were making the  
22 stuff basically for free. All of our competitors were  
23 having another company make it for them. Okay? The profit  
24 margins were in the thousands of percents. Okay?

25 This memo, if I can give it to the Court -- I've

1 already given Mr. Samaro a copy, and Mr. Rosarbo has a  
2 copy -- outlined that things were being sold at all  
3 different prices. Because no one knew the hour or the day,  
4 we shipped to a lot of people. We shipped to GNC, we  
5 shipped to Rite-Aid, we shipped to a lot of jobbers, and  
6 over 100,000 convenience stores -- I'm sorry, 80,000  
7 convenience stores. If we shipped Ephedra product to GNC,  
8 at least, we were averaging about \$12 million a year in  
9 sales, okay, and the law came down, which eventually it did,  
10 we would have to refund all that money. Okay?

11 So what was happening in the background with  
12 Mr. Occhifinto and Mr. Rosarbo is, this product was being  
13 sold for cash at a large profit. N.V.E. didn't lose money,  
14 they made money. In the end, when the law came down, both  
15 Mr. Occhifinto and the companies that Mr. Rosarbo ran were  
16 caught with product. But they took the risk, they rolled  
17 the dice, and they made millions before that happened.

18 All the records are destroyed that show that  
19 pricing was all over the place. You could come in with a  
20 suitcase of cash and get it at half price. Why? Because  
21 you had the cash, okay?

22 She outlines here, the person that was on our  
23 sales team outlines here in the memo where she says, we're  
24 doing deals all over the place because this guy's been with  
25 us so long, this guy's -- that goes directly to the heart of

1       their case.

2               They're saying this stuff sold at this price, and  
3       we never wavered. That's not true. It's not close to true.

4               THE COURT: Are you going to have witnesses at  
5       trial that are going to speak to that?

6               MR. PALMERONI: We have myself, we have  
7       Mr. Rosarbo. We have -- I mean, we have this memo here.

8               THE COURT: So let me understand.

9               MR. PALMERONI: Yes.

10              THE COURT: Let me just put it in context.

11              Let me understand. Give me an example with real  
12       numbers, Mr. Samaro. So, all the products that were part of  
13       this distribution scheme were Ephedra products?

14              MR. SAMARO: Until later on -- so the brand name  
15       is Stacker 2, and for most of this history, they are Ephedra  
16       products. In 2004, Ephedra is banned, and then this  
17       distribution scheme continues with the Ephedra-free version  
18       of the product.

19              THE COURT: Got it. So do you dispute that there  
20       was all different pricing policies for Stacker 2 products  
21       with the Ephedra?

22              MR. SAMARO: The way it's described here, we  
23       certainly do.

24              So, the most popular format for this product was  
25       the 20-count bottle, and for the most part, as far as we can



1 tell, in the vast majority of cases, the wholesale price was  
2 \$2.75 domestically.

3 THE COURT: How much?

4 MR. SAMARO: \$2.75 for a 20-count bottle.

5 THE COURT: What was retail?

6 MR. SAMARO: Retail was -- depended on the store.  
7 You know, they would be sold -- these were wholesale sales,  
8 so -- sometimes they were sold to convenience stores, which  
9 were very expensive. Maybe Earling could tell me. I don't  
10 know what the --

11 THE COURT: And how much was it sold to the -- is  
12 it a European-related company?

13 MR. SAMARO: Right. Mostly, a dollar-thirty.  
14 Okay?

15 THE COURT: Okay.

16 MR. SAMARO: So here's what I can't tell you with  
17 any precision, which is the complication for us.

18 There were certainly times, if you called  
19 Mr. Occhifinto and you were willing to buy a truckload, he  
20 would discount the 2.75 to something else, maybe 2.50. You  
21 know, it varied. It was never, never as low as the  
22 international price.

23 And we have Mr. Rosarbo's deposition where he  
24 admits to all of this. I mean, he's asked the question, you  
25 know, was the price lower --

1           THE COURT: Let me just understand. The scheme is  
2           that an existing client of N.V.E. wants a bottle, one bottle  
3           of Stacker 2, so they buy it at the European price, resell  
4           it at the U.S. price, and take the difference?

5           MR. SAMARO: Yes, and --

6           THE COURT: And were those existing clients or new  
7           clients?

8           MR. SAMARO: Everyone -- as far as I can tell,  
9           Your Honor, everyone was an existing client.

10          Not only that. Mr. Palmeroni is in charge of  
11          sales, right? So he's in charge of making these deals to  
12          sell N.V.E. product. He is the one diverting it. You know,  
13          they hire a warehouse. They have the stuff delivered to  
14          this warehouse. It was bought in the name of an existing  
15          European client, and then he would sell it to the very  
16          customers that he was working with for us, for N.V.E. So he  
17          could decide, he could -- he was undercutting our prices  
18          substantially, which, as Mr. Rosarbo said in his deposition,  
19          is the only reason this scam worked, and it worked because  
20          there was such a disparity.

21          THE COURT: But Defendants don't deny that you  
22          were doing this.

23          MR. PALMERONI: Your Honor, I've spoken to this  
24          since the beginning, since my first interrogatories.

25          I was approached by Mr. Rosarbo, who had been in

1 prison with Mr. Occhifinto, about selling some product that  
2 was going to be seconds, mislabeled. This happened daily at  
3 N.V.E. We didn't have trained personnel there, and when  
4 sales went from one million a year to 80 million a year, it  
5 was a mess.

6 Most of my time was spent on the road. I was on  
7 the road a minimum of --

8 THE COURT: So, in other words, is your defense  
9 that Mr. Occhifinto was complicit in this scheme?

10 MR. SAMARO: Yes. Well, I don't know exactly the  
11 terminology, if that's the right terminology. He was making  
12 money with Mr. Rosarbo.

13 THE COURT: Did he know you were doing this? Did  
14 he know that you had existing customers, and instead of  
15 selling it for the going rate -- whether or not  
16 Mr. Occhifinto as president sold it for 2.75 or 2.25 or, you  
17 know, a dollar-ninety, that's, you know, that's whatever --  
18 you know, businesses do what they want to do to get rid of  
19 their product and cut their own profit. But that's markedly  
20 different than saying, I'm going to take an existing client,  
21 I'm going to buy it at the European price, and then I'm  
22 going to resell it to the same clients and pocket the  
23 difference, because, if that's it, Mr. Occhifinto wouldn't  
24 be necessarily involved in that, because he could have just  
25 sold it for a dollar-thirty from his own warehouse. He

1 wouldn't have had to have a second company that sounded very  
2 close to the name of the European international company.

3 MR. PALMERONI: Your Honor, they admit that they  
4 don't have the records for --

5 THE COURT: No, I'm not asking about the records.  
6 But their theory is -- they had the records from the  
7 international company?

8 MR. SAMARO: No, they don't. No.

9 THE COURT: They had none of those records,  
10 either?

11 MR. SAMARO: No, Your Honor.

12 MR. PALMERONI: No, and Judge Salas speaks to it.  
13 They don't have the records for what they supposedly sold it  
14 to Europe for. They don't have the records for -- and the  
15 reason I say Mr. Rosarbo is because he was the operator of  
16 the company day-to-day. My end was --

17 THE COURT: There are no records at all, even from  
18 clients? You couldn't reconstruct any records? Was there a  
19 consistent price? You said a dollar-thirty?

20 MR. SAMARO: There are some records, Judge, on  
21 this, but -- there are some records. What we have are the  
22 checks. We have the very checks from our clients, the  
23 distributors of this product, to their company, right? They  
24 had this company, American Wholesale Distributors, that was  
25 selling our product at this reduced rate. We have those

1 checks. That profit, whatever they were sold for, all of  
2 that profit was because they were running this side  
3 business, diverting our product.

4 THE COURT: Have they admitted that? What did  
5 they say under oath when they were asked about -- the money  
6 that was in these companies, whose money was it?

7 MR. SAMARO: So, it's very interesting.  
8 Mr. Rosarbo in his deposition admits to this whole scheme.  
9 Chapter and verse, everything I've just said, he admits to.

10 Mr. Palmeroni, on the other hand, says -- and they  
11 got millions of dollars. We have them getting millions of  
12 dollars for this. Mr. Palmeroni says, I had no idea what  
13 Vinnie was doing, I was just collecting these checks.

14 Well --

15 THE COURT: All right. Well, whatever.

16 So, let me just finish up on this point.

17 I'm inclined to stick with my initial ruling,  
18 which is, I'm going to hold on it, for this reason.

19 It's a big issue. It's not a minor issue in the  
20 case; it's a substantial issue as to any of the pricing  
21 documents. I'm not sure it's going to be relevant, but  
22 we'll see how the trial unfolds.

23 And you can explain, which you'll have to explain  
24 anyway to the jury, that, you know, that some of the  
25 documents weren't preserved. I mean, you're going to have

1 to explain it. It's your choice; you don't have to explain  
2 it, and they may get an adverse inference. You may  
3 reference it, and you can decide.

4 But right now, right now, the ruling of the  
5 District Court is that -- to get an adverse inference at the  
6 jury charge. I will reconsider that ruling at the end of  
7 the close of evidence, for these reasons, why I'm not doing  
8 it right now. One, I'm not really sure what the relevance  
9 of the documents are. Number two, so much time has passed.  
10 You knew about this rule change in 2015, and no one made  
11 this application to me.

12 MR. SAMARO: So, Your Honor, we --

13 THE COURT: So let me just finish why, and this  
14 really goes to what makes it different than any of the other  
15 cases, where, you know, post-'15, a ruling is made by the  
16 Court applying this conduct from '14. That's what Chief  
17 Judge Roberts's ruling, notes meant to address.

18 But, for example, there is the Mac or whatever  
19 it's called --

20 MR. PALMERONI: The Mac system, Your Honor.

21 THE COURT: -- the Mac system, that can't be  
22 unlocked other than at great expense. And if you had made  
23 this motion, rather than making it -- literally, the papers  
24 are filed December 23rd of 2019, maybe that would put them  
25 on notice to get the documents from other sources, spend the

1 money on an expert. Maybe you would have considered it if I  
2 had denied it.

3 But to make that ruling now when they have relied  
4 on this somehow in some of their defense that they don't  
5 have the documents, we didn't do anything wrong, I can't  
6 really tell that at this point.

7 So, you know, what makes it a little different,  
8 without hearing all the evidence, I'm not convinced that it  
9 would be fair to the Defendants to change that ruling  
10 literally on the eve of trial when we've known about the  
11 change in law for five years.

12 MR. SAMARO: Can I just say, Your Honor --

13 THE COURT: Sure.

14 MR. SAMARO: So Judge Salas's ruling was based  
15 upon the Judge Scheindlin opinion from Manhattan, from the  
16 Southern District, and that case, not long after Judge Salas  
17 made her ruling, was overruled by the 2nd Circuit in another  
18 case, and then that logic was adopted by the 3rd Circuit in  
19 yet another case. And so we brought a motion for  
20 reconsideration to Judge Salas, pointing out that the state  
21 of the law at that time --

22 THE COURT: Pre-'15? Pre-'15?

23 MR. SAMARO: What's that?

24 THE COURT: Pre-rule change.

25 MR. SAMARO: Yes. Well, because, in our view, and

1 I think this is right, the law had already changed.

2 THE COURT: I hear you. I appreciate that.

3 MR. SAMARO: It had already changed in this  
4 district, and so that's why we caught that.

5 So I don't know how many reconsideration motions  
6 we're going to file, but now we find ourselves on the eve of  
7 trial with, you're right --

8 THE COURT: I hear you. But I'll tell you -- I  
9 hear you, and I appreciate that, and that's another factor.  
10 But when the rule was changed, the Supreme Court of the  
11 United States said that "It shall take effect on 2015 and  
12 shall govern in all civil proceedings thereafter commenced,  
13 and, insofar as just and practical, all proceedings then  
14 pending."

15 So he really gave an opening to say, reconsider it  
16 even if it's pending.

17 This had already been decided, but I think it  
18 fairly falls with impending, because there had not been an  
19 adverse inference given yet at trial.

20 So, what I'm saying is -- I'm not faulting you,  
21 Mr. Samaro, at all. I'm just saying it becomes difficult  
22 when a ruling was made by a judge 10 years ago, the rule  
23 changed five years later. Unlike other cases, the documents  
24 are locked away in this old computer, and then on the eve of  
25 trial, 10 years later, we're changing the ruling. I hear



1       you. And the Defendants are pro ses, and the documents are  
2       locked away. I feel like that "Saturday Night Live" skit  
3       with Al Gore, when he says, it's in a lockbox: It's in a  
4       lockbox somewhere, and we can't access the documents.

5               MR. SAMARO: I'd just like to say one other thing  
6       for the record.

7               So, before the last trial date -- we have been at  
8       the pretrial, post-pretrial stage for three years, and in  
9       early iterations of the pretrial -- well, one, we filed a  
10      motion for reconsideration then, some years ago, and it's  
11      always been in our pretrial order that we intended to do  
12      this. That's been out there for three years.

13              THE COURT: So noted.

14              MR. SAMARO: Thank you, Judge.

15              MR. PALMERONI: Your Honor, I mean, Mr. Samaro has  
16      had a lot of time and a lot of legal training to talk about  
17      this, but --

18              THE COURT: You're doing okay.

19              MR. PALMERONI: Judge Salas looked into this  
20      deeply. She had oral arguments that went on for hours. She  
21      admonished the other side for not being prepared, for not  
22      bringing certain people that they said they were --

23              THE COURT: Counsel -- sir, let me state, I don't  
24      need argument on that.

25              MR. PALMERONI: Okay. That's fine.

1 THE COURT: Judge Salas did what she thought was  
2 appropriate under the law. She followed the directive of  
3 the Southern District of New York. The only reason we're  
4 having this argument is because the 3rd Circuit and the  
5 Supreme Court of the United States now have a different  
6 standard. If this issue was before me now, you would not  
7 have an adverse inference.

8 MR. PALMERONI: Okay.

9 THE COURT: You would not have one because the law  
10 is very clear that it has to be intentional, with the intent  
11 to deprive the other party of the information used in the  
12 litigation.

13 MR. PALMERONI: And that's what I want to speak  
14 to, Your Honor, and I'll be very quick.

15 I know you don't want to hear what Judge Salas  
16 said, but it says: "As a result, Mr. Palmeroni is  
17 prejudiced as to both defend the claims against him and  
18 prosecute his counterclaims. Whether or not the law has  
19 changed -- " --

20 THE COURT: The counterclaims are gone.

21 MR. PALMERONI: I understand that. I'm just  
22 reading what she said. I was prejudiced by it. Okay?

23 THE COURT: You're not prejudiced by the  
24 counterclaims because I've dismissed the counterclaim. So  
25 there's no prejudice.

1           MR. PALMERONI: No, no. She said both. I'm sorry  
2 to -- I'm just reading the full sentence. I didn't want to  
3 cut it off.

4           "As a result, Mr. Palmeroni is prejudiced in his  
5 efforts to both defend the claims against him..." I'll just  
6 stop there.

7           THE COURT: I hear you. I hear you.

8           MR. PALMERONI: And the standard at the time -- I  
9 need to speak to this, because we can whitewash all we want  
10 and say, well, they didn't do it on purpose, there wasn't a  
11 litigation hold. When I arrived at N.V.E. in 1999,  
12 Mr. Samaro was already counsel for N.V.E. He prepped me for  
13 deposition. They had been in litigation from years before I  
14 left to years after. To say there was no litigation hold or  
15 they didn't -- I think we would have -- we would have gone  
16 after that in court, but what Judge Salas said was, because  
17 there was gross negligence, she didn't have to go there.

18           But they had been marked for spoliation in a  
19 Michigan case that ran at the same time as this. They were  
20 in a New Jersey case against the State of New Jersey where  
21 evidence was -- disappeared. It's a pattern, Your Honor,  
22 because, I was showing -- they were in bankruptcy when they  
23 brought this. They hid it from the Bankruptcy Court. I was  
24 not wanting to partake in bankruptcy fraud. I was -- and I  
25 admitted from the beginning -- I was picking up money in

1 suitcases at Mr. Occhifinto's private plane for his product,  
2 okay? Once it went into bankruptcy, I don't know where the  
3 money goes. He can claim it, he cannot claim it. That's  
4 not on me. Once we went into bankruptcy, I refused to do  
5 it. The records show clearly, and that's why they were  
6 destroyed after my counterclaim was brought and after my  
7 defense on this was brought, they were destroyed or not  
8 destroyed, and it happens that everything was destroyed.  
9 They would send out the product, and I described it before  
10 any of this. My story has never changed; theirs has, quite  
11 a few times, but mine's never changed. They -- that  
12 accounting system, when we would send something out for  
13 \$250,000, okay, and I have to go pick up the cash, it would  
14 say zero. The invoice would say zero. Shipping would send  
15 it out. Mr. Occhifinto would initial it.

16 THE COURT: So here's the theory -- and I'll get  
17 to the other motions later.

18 And let me just tell you, because you're not a  
19 lawyer, and you're going to abide by my rulings. And this  
20 is the most important ruling. Listen to it carefully. If  
21 you try to say something that's contrary to my rulings, you  
22 will be shut down immediately, and the jury will understand  
23 that you were shut down immediately. In other words, this  
24 is not -- and we'll get to these later -- this is not going  
25 to be -- this case will be decided on the facts about this

1 case.

2 So, you talk about money and cash and midnight and  
3 bags and all this stuff. That is not what this case is  
4 about. This case --

5 MR. PALMERONI: It's about money, Your Honor.

6 THE COURT: This case is about their theory that  
7 you and Mr. Rosarbo had a scheme where you purchased the  
8 product with a European company and you routed it back to  
9 your company, and then that company sold it to the  
10 distributors, and you pocketed the difference. That's their  
11 theory.

12 They're not disputing -- I haven't heard them --  
13 that in the U.S. company that Mr. Occhifinto sold product at  
14 lower costs. He might have even sold it in cash. There's  
15 nothing wrong with selling things and taking cash if all the  
16 other requirements about cash are complied with. He could  
17 sell his own U.S. product. This case is not about, he sold  
18 deep discounts to U.S. companies. What it's about is that  
19 you set up a company, you and Rosarbo, and you bought  
20 product through the European company and then sent it back  
21 through a company you set up with a very similar name, and  
22 from that company, you sold product to the existing  
23 customers.

24 The pricing is important in understanding what you  
25 would have been selling to those customers as, and that's

1 one thing to say how much -- so there's all different ways  
2 to calculate damages, and one of the ways is to say -- and  
3 the Plaintiff can request whatever damages he wants. I  
4 mean, he is the master of his own complaint. He can say, I  
5 want lost profits. I want the difference between -- if I  
6 had all my invoices and I would have been selling to all  
7 these folks at 2.75 a bottle, and I lost the profit on  
8 that -- and I lost, you know, all the profit on that sale at  
9 the 2.75, that would be one measure of damages. Another  
10 measure of damages could be, I want whatever profit you made  
11 from this scheme if the jury is satisfied that it satisfied  
12 the elements of fraud. And I could get disgorged from you  
13 whatever money you got, even, theoretically, if you sold it  
14 for less than what they were selling in the U.S., then -- or  
15 even less than the -- well, it would never be less than a  
16 dollar-thirty, but even less than what we were selling in  
17 the U. S., you still profited by a scheme that cut N.V.E.  
18 out of the loop, and the profit went right from the European  
19 to you.

20 MR. PALMERONI: There's no proof of what was sold,  
21 Your Honor.

22 THE COURT: But listen. Listen.

23 MR. PALMERONI: There's no proof. A lot of that  
24 product was seconds, it was mislabeled, sometimes went to  
25 Europe, sometimes went in --

1 THE COURT: But, counsel, listen. Listen to me.

2 MR. PALMERONI: I'm sorry.

3 THE COURT: That's your defense. Your defense is,  
4 we sold what? You sold old product, expired product; none  
5 of your product was good product. You had a company --  
6 like, Mr. Rosarbo at his deposition confirmed the whole  
7 scheme. He said, we set up a company with the same name and  
8 we used it to buy product from the international company and  
9 route it through and then send it to the other folks.

10 Now, if you're going to say that wasn't the  
11 scheme, the scheme was, we had this company to sell  
12 independently seconds and reject products to customers, you  
13 still sold product to customers who were customers of N.V.E.  
14 and deprived them of the ability to sell their own good  
15 product to them.

16 So, you can say that, and the jury can evaluate  
17 all that. The narrow issue before me is, should the jury be  
18 given an adverse inference, meaning, should they be  
19 instructed as a matter of law that the destruction of  
20 documents warrant, I don't know, some kind of instruction  
21 that they could consider that in arriving at damages? I  
22 mean, I've got to think about, Judge Salas did not  
23 articulate what the adverse inference would be. What that  
24 would be would really be -- whether it goes to liability or  
25 damages would be for me to see as the evidence goes through

1 at trial.

2 So here's why we're going to stop talking about  
3 this issue right now: I'm reserving on it. Right now, you  
4 have an adverse inference. We don't know what that adverse  
5 inference will be. The Plaintiff has said, given the change  
6 in the law, that should be vacated, and I am going to hold  
7 that motion until at least the close of Plaintiff's case,  
8 probably the close of all the evidence, and I'll decide at  
9 that point whether I should give the inference, because  
10 that's all that matters is this narrow issue of, in addition  
11 to a big stack of jury instructions, should they be given an  
12 adverse inference charge as well.

13 So, that is something -- right now, it's the law  
14 of the case. I may consider it. I think I'm best to  
15 consider it to see whether it's appropriate then.

16 So I'm going to hold on that, and if I change my  
17 mind between now and when we start the trial, if I look at  
18 this more closely, you will be told, or for any reason. My  
19 only concern in letting it go until the end is that it's not  
20 fair to the Plaintiff and the Defendants, especially the  
21 Plaintiff, on how to affirmatively put in evidence of his  
22 case, what he's going to open on, whether that's going to be  
23 an issue. But I'm inclined to hold it until the end because  
24 I think that's appropriate.

25 So let's put that on hold, and you'll have another



1 opportunity to fully be heard. I have the briefing from  
2 Mr. Samaro and his law firm, and if we have to take a break  
3 and half a day and argue this one out before the jury is  
4 sent to deliberate, we'll do it then. Okay?

5 MR. PALMERONI: Your Honor, one more thing, not on  
6 this, but you keep referring to Mr. Rosarbo's deposition.

7 THE COURT: I did it twice because Mr. Samaro did.  
8 I recalled that from the motion practice.

9 MR. PALMERONI: Okay. Mr. Samaro is very aware of  
10 a letter that all of us received from Mr. Rosarbo  
11 undercutting what he called his tainted testimony. He was  
12 unrepresented, and the letter, which I don't have in front  
13 of me, is -- I -- it's -- it's -- he talks about secret  
14 meetings with Mr. Occhifinto which Mr. Occhifinto claimed in  
15 a deposition when we had him where he meant to discuss what  
16 would be said before he was deposed. That letter talks to  
17 witness tampering, to extortion. I'm not a lawyer, but --  
18 I'm not law enforcement, but he's already undercut --

19 THE COURT: Didn't you have a lawyer in this case  
20 early on?

21 MR. PALMERONI: Did I?

22 THE COURT: Yes.

23 MR. PALMERONI: Mr. Vort passed away.

24 THE COURT: Okay.

25 MR. PALMERONI: Here in court.

1 THE COURT: Okay, and you never retained a new  
2 lawyer.

3 MR. PALMERONI: No one's willing to step in at  
4 this late date with all the paperwork for the kind of money  
5 -- I was in bankruptcy. I've been in bankruptcy, as  
6 Mr. Rosarbo was.

7 THE COURT: Okay.

8 MR. PALMERONI: So there wasn't any money really  
9 to -- but no one's interested, even -- I mean, it's just a  
10 really old case.

11 THE COURT: When you testify and he is deposed, he  
12 will, you know, when he's put on cross -- when he speaks,  
13 we'll have to talk about, during your case, you're going to  
14 be your own witness, and we're going to have to talk about a  
15 protocol for that.

16 MR. PALMERONI: Yes, ma'am. I wouldn't know how  
17 to do it at all anyway, so I would look to your guidance,  
18 obviously, Your Honor.

19 THE COURT: So we're going to talk about that,  
20 Mr. Samaro, because he's going to be his own witness. Then  
21 you're going to cross-examine him. I'm going to take a look  
22 at that. It may be appropriate to have a list of questions  
23 that he will ask himself or that will be asked. The Court  
24 will ask them, or you can think of a protocol how we're  
25 going to allow both -- the Defendants sound like they're the

1       only two witnesses in the defense. Will you be calling them  
2       in your primary case?

3               MR. SAMARO: So, I believe at this point, we will  
4       limit how we call them to using depositions. So, in other  
5       words, what I envision is the first day of trial being  
6       primarily comprised of deposition testimony from  
7       Mr. Rosarbo.

8               THE COURT: Read-ins. As an admission.

9               MR. SAMARO: Yes, from one end to the other.

10              THE COURT: So, I don't understand how you would  
11       read in anything other than admissions.

12              MR. SAMARO: Well, so the rule says that I can use  
13       the deposition for anything I want. The rule says --

14              THE COURT: But you can, subject to the evidence  
15       rules.

16              MR. SAMARO: But the specific rule says that I can  
17       use the transcript for any purpose that I would have a  
18       witness testify to, and so it's -- again, it's all of the --

19              THE COURT: Well, I think we're mixing up a couple  
20       of concepts. I want to make sure we understand how the  
21       trial is going to go forward.

22              What rule are you talking about that says you can  
23       use depositions for any purpose?

24              MR. SAMARO: I will tell you.

25              So, it's Federal Rule of Civil Procedure 32,

1 Judge.

2 THE COURT: Thirty-two is called "Model Diagram  
3 Exhibits and Lodging."

4 MR. SAMARO: 32(a). Do we have the right --

5 THE COURT: I'm sorry, I'm in the wrong rules.  
6 Sorry.

7 It says, "(a): At a hearing or trial, all or part  
8 of a deposition may be used against a party on these  
9 conditions:

10 "(A) the party was present or represented at the  
11 taking of the deposition or had reasonable notice of it;

12 "(B) it is used to the extent it would be  
13 admissible under the Federal Rules of Evidence if the  
14 deponent were present and testifying..."

15 MR. SAMARO: Right, Judge. So that says to me  
16 that, whatever I would get through this witness if I called  
17 him as a witness, I could instead substitute for his  
18 deposition.

19 THE COURT: I'm not sure that that's the  
20 construction of 32(a). I'm going to take a look at it. I  
21 think the deposition can be used to the extent it would be  
22 admissible under -- so you can use it the same way you would  
23 use it if he was testifying, meaning if there was an  
24 admission. It doesn't mean you can read an entire  
25 deposition, because most of a deposition is hearsay, and

1 just like he couldn't testify to hearsay at a trial and he  
2 couldn't testify -- he might have been asked hearsay  
3 questions -- if this rule is construed the way you suggest  
4 it is, it would be to get around all the hearsay rules.

5 MR. SAMARO: Your Honor, don't get me wrong: To  
6 the extent there's anything objectionable about the question  
7 and answer, then I wouldn't -- I'm not just going to use the  
8 whole transcript without going through it and segregating  
9 those aspects that I think are both useful to my case and  
10 admissible. To the extent it would be hearsay, then, of  
11 course, I couldn't use it.

12 THE COURT: So, I'm not convinced that that's the  
13 construction of (B). It would be, if he was present and  
14 testified in a court, and you cross-examined him, and at the  
15 end, you could read in parts of his deposition. Whether  
16 he's here or not, just like this rule says, we can only read  
17 in admissions or statements against interest. You couldn't  
18 read in everything.

19 So, just like if a party is present at trial, and  
20 he's here, at the end, the only thing you can read in is  
21 admissions.

22 MR. SAMARO: Your Honor, I've done it the other  
23 way before, and I am happy to provide --

24 THE COURT: It may be the same thing.

25 MR. SAMARO: Yes. I'm happy to provide a brief on

1       this, if you'd like, and we --

2               THE COURT: Well, I don't want a brief. I want  
3 context. Are you planning to -- like, I want to know what  
4 you want to read in. I want it done by our hearing, our  
5 telephone call in February.

6               How long was the deposition taken for? A day?

7               MR. SAMARO: Well, he had three days.

8               THE COURT: Well, then, you should have for me  
9 what you plan to read, and let him object to it. That will  
10 hold us back -- that's something that should have been done,  
11 frankly, in the final pretrial conference: That's what  
12 we're prepared to read in, we're reading it in because X, Y  
13 and Z, and then we'll let him respond to it.

14              MR. SAMARO: Your Honor, in all fairness, when we  
15 were before Judge Wettre, we asked her, would you like page  
16 and lines for purposes of this pretrial, because everybody  
17 seems to have their own form, and --

18              THE COURT: Mr. Samaro, I'm not casting blame.  
19 I'm telling you that I want it now.

20              MR. SAMARO: Of course.

21              THE COURT: I don't want just line and page. I  
22 want you to give me a stack of what you're going to read in,  
23 and I will take a look at it.

24              MR. SAMARO: We absolutely will, Your Honor.

25              THE COURT: And just bear in mind, he's going to

1       testify. So, I'm not going to tell you how to run your  
2       case, but you're going to do all these read-ins and not call  
3       his as a witness, as an adverse party?

4               MR. SAMARO: So what we -- probably not. I assume  
5       he will testify when it's his turn, and then I will  
6       cross-examine him then. What I have done before and what  
7       I'd like to do now is have somebody else take the stand --  
8       not him, of course, an actor, who I will ask the question  
9       to, and he will respond to it so the jury will hear.

10              THE COURT: I'll decide that, that's ministerial,  
11       at the time. I'm not calling in actors. Normally, I have  
12       lawyers just read in the questions and answers. But we can  
13       reconsider that at the time you're going to do it.

14              MR. PALMERONI: Your Honor, as far as this  
15       procedure goes, it seems as if -- and I've obviously never  
16       done it before, but it seems as if we're still deciding how  
17       this is going to work as far as protocols.

18              THE COURT: No. Counsel --

19              MR. PALMERONI: I'm saying, for me being -- for me  
20       being on the stand, I mean. I mean, is that normally how  
21       it's done?

22              THE COURT: It's not normal that in civil cases --  
23       it's highly unusual that folks are pro se in civil cases,  
24       especially of this magnitude. It's very rare.

25              MR. PALMERONI: Would I be able to have someone

1 question me? It's a strange -- I don't know the dynamic --

2 THE COURT: No, there's a protocol that I'm going  
3 to take a look at. It wasn't given to me. I want  
4 Mr. Samaro to submit something to me before our next  
5 hearing. There may be a protocol where you will prepare the  
6 questions that you want asked. Maybe the Court will ask  
7 them, maybe you will ask them to yourself, I'm not sure, but  
8 it's going to be something along those lines. It's not  
9 going to be a free-flowing narrative of you up there just  
10 telling your story. There are going to be questions that  
11 you're going to have to prepare.

12 But I want to think about what that proper  
13 procedure is.

14 I don't know if Mr. Samaro has thought it through.

15 MR. SAMARO: Yes, I've seen it done that way, Your  
16 Honor. I've seen judges just allow the witness to give a  
17 narrative.

18 I think a narrative is rough in this case.

19 THE COURT: I do, too, and that's why -- you could  
20 -- you know, I may ask you to give me a rough outline of  
21 questions in areas that you want to cover in your story, and  
22 either I'll ask them or I'll have you ask them to yourself.  
23 First, you know, I'm going to give some background -- like  
24 broad questions, and you can give a little narrative, but  
25 it's not going to be just, you get up there and say, ladies



1 and gentlemen, I'm going to tell you my story. It's not  
2 going to be that. It's going to be questions. Maybe I'll  
3 ask the questions. You can give them to me the day that you  
4 want to testify. Maybe you ask them to yourself. I'll take  
5 a look at what is the better practice, and that way -- and  
6 the reason why I would do that, so you know, is that there  
7 are Rules of Evidence that guide what witnesses can say at  
8 trial. Either it's hearsay that's prohibited, but there are  
9 all kinds of exceptions to the hearsay rules. There are  
10 other Rules of Evidence. There are foundational questions.  
11 And although I will give you latitude because you're a  
12 pro se, if you're just given a completely free, open  
13 platform to tell your story, it would be unfair to me and to  
14 the jury and to Plaintiff's counsel that they wouldn't be  
15 able to object before something was said that might be  
16 inappropriate.

17 So, if you set up your questions, and I'll give  
18 you plenty of advance notice so you can think about what you  
19 want to tell the jury, and I'll finish up these motions in a  
20 minute. That way, either I'll ask the questions, or some  
21 neutral person, Amy or myself, or you will state the  
22 question, and then answer them, so we know what is coming,  
23 and you can -- you certainly don't have to tell us your  
24 answer, but -- for example, Mr. Samaro is going to want to  
25 cross-examine you. He's going to cross-examine you based on

1       what you said and whether it's inconsistent with the prior  
2       testimony, and he's going to cross-examine you generally,  
3       and he's not going to be able to prepare his  
4       cross-examination if he doesn't have a sense of what the  
5       subject area -- what the questions are as you've asked them.

6               So, I will let you know that protocol when we  
7       speak again in February.   Okay?

8               MR. PALMERONI:   Thank you, Your Honor.

9               THE COURT:   And, since you asked:   It is unusual.

10              So that's the second.   And then I want to go  
11       through the other motions.

12              So there are a number of motions that were filed  
13       in limine by the folks representing N.V.E.

14              And so let me just make an overall comment here,  
15       because I know I have a pro se.

16              Trials are governed by evidence rules, and  
17       Rule 401 of the Federal Rules of Evidence provides that  
18       evidence is relevant if it tends to make a fact of  
19       consequence more probable or less probable.

20              And even if evidence is relevant, it may be  
21       excluded in my discretion if its probative value is  
22       substantially outweighed by danger of unfair prejudice,  
23       confusion of issues, misleading a jury, or by considerations  
24       of delay, waste of time, or needless presentation of  
25       cumulative evidence.

1                   So that will govern my rulings here. And I'm  
2 mindful that this case is about an affirmative claim brought  
3 by the Plaintiff on a very narrow ground.

4                   The final pretrial is the document that will  
5 govern the trial in this matter, and it's one that was  
6 entered into with everyone present, and signed by Judge  
7 Wettre.

8                   And it sets forth -- you know, I don't have it  
9 with me, it's in my chambers, but I believe there are five  
10 causes of action, Mr. Samaro. What are the five causes of  
11 action that are in the complaint?

12                  MR. SAMARO: Fraud -- so these are the ones that  
13 remain, Your Honor.

14                  THE COURT: Okay.

15                  MR. SAMARO: Fraud is Count 6. Fraud, deceit,  
16 Count 7.

17                  THE COURT: Is that the same thing?

18                  MR. SAMARO: Yes, I think so.

19                  THE COURT: Okay.

20                  MR. SAMARO: It doesn't strike me as any  
21 different.

22                  Interference with economic advantage, unlawful  
23 interference, Count 8; civil conspiracy, Count 9; and breach  
24 of duty of loyalty, Count 11.

25                  THE COURT: Okay. And all of these stem from two

1 things, the distribution scheme and the kickback scheme.

2 And so those are the issues that are going to be relevant to  
3 the claims in this case, and why we talked earlier about the  
4 importance of any of these from the documentary evidence.

5 So, there are a couple of issues that the  
6 Plaintiff has raised and has asked the Court to make an  
7 in limine ruling on some evidence, and I'm going to go  
8 through this in the order that it's set forth in the brief.

9 I'll ask Mr. Rosarbo or Mr. Palmeroni if they have  
10 anything to add.

11 The first issue is, the fact that Mr. Occhifinto  
12 had a child with another employee is not relevant.

13 I agree with that. It is not relevant under 401.  
14 I'm inclined to rule it's not relevant under 401, or, even  
15 if it was, that it would be excluded under 403.

16 Anything you want to add? If you want to be  
17 heard, you can be heard.

18 Mr. Rosarbo?

19 MR. ROSARBO: Yes, Your Honor.

20 The reason why I think that is relevant is, the  
21 nature of how I met Patty Cosentino --

22 THE COURT: It's not relevant. It's just not  
23 relevant. It's not about how you met. It is prejudicial.

24 This case is not about sexual harassment; it's not  
25 about in-office relationships, it's not about having a child

1 outside of marriage. It would not make any of the facts  
2 about the fraud, the interference with economic advantage or  
3 duty of loyalty any more probable. It's not even a close  
4 call, actually.

5 MR. ROSARBO: All right. How about when that came  
6 about, that she was pregnant, and we were told to -- she  
7 used to sit right next to me, and we were told to, like, not  
8 even hear that she was an employee, to freeze her right out.

9 THE COURT: That is absolutely irrelevant to the  
10 claims that he has filed against you for fraud, interference  
11 with economic advantage, and breach of the duty of loyalty  
12 stemming from the kickback scheme and the distribution  
13 scheme. It's just not relevant, and I'm keeping it out of  
14 the case.

15 Similarly, the same ruling with respect to  
16 Mr. Occhifinto's wealth or lack of wealth: It's not  
17 relevant. How much money you have or you make now is not  
18 relevant. The fact that you've had a bankruptcy is not  
19 relevant. What's relevant is fraud, the civil conspiracy,  
20 the breach of duty of loyalty, and your defenses to that.

21 MR. ROSARBO: Okay. So how about Mr. Occhifinto,  
22 while I was in bankruptcy, going into my Bankruptcy Court  
23 and intimidating my bankruptcy people?

24 THE COURT: It's irrelevant. It's not part of  
25 this case.

1 MR. ROSARBO: What I'm trying to say is, we could  
2 have had this trial already in Connecticut with -- I could  
3 have had representation, with a judge, and the case would  
4 have been over. So, as far as they were concerned, that  
5 couldn't happen because they came up with some bogus  
6 complaint about, the people would have to travel to  
7 Connecticut. Well, his main witnesses are from Wisconsin  
8 and California.

9 THE COURT: It's irrelevant to this case. This  
10 case is not about the Bankruptcy Court. It just isn't.  
11 This case is about what happened from 2000 to 2006 at your  
12 workplace.

13 MR. ROSARBO: You're absolutely right, Your Honor.  
14 What I'm trying to say is, Bob Occhifinto's pattern and  
15 character is consistent with his criminality of many years  
16 that go on and on and on. He hasn't changed his tune. He's  
17 been like this for an extended period of time. He's  
18 continually in litigation, and he doesn't have any loyalty  
19 whatsoever except for himself, and he starts out making out  
20 that he's your friend until he feels that, you know, he  
21 doesn't need you anymore, and then he just throws you to the  
22 wayside, and then also he harasses you. He's harassed me  
23 ever since I got into this case. He didn't belong in my  
24 Bankruptcy Court.

25 THE COURT: Sir. Sir, listen: This is what you

1 have to understand: --

2 MR. ROSARBO: Go ahead.

3 THE COURT: -- that that is not part of this case;  
4 that the facts in this case will be -- what I allow in will  
5 be governed by the Rules of Evidence and the claims that  
6 have been asserted here.

7 There is no claim here for harassment. I don't  
8 think there could be. But there is no counterclaim for  
9 harassment, that you continued to be an employee and he  
10 retaliated against you. There's no sort of claims about  
11 that. So, yes, that's your view, that this is who he is,  
12 that he's a criminal, you've said it a few times, this is  
13 criminal behavior, he was a bad guy. That doesn't come in.  
14 That's not a defense to what you did. This is not about  
15 him, it's about you in this case. There is no counterclaim.  
16 It's about his affirmative claims against you.

17 So, what I'm trying to do is go through the motion  
18 that Plaintiff's counsel has made about what he's asking --  
19 what's to be kept out, and I want you to understand, first,  
20 no references to the woman and the baby, or to the fact that  
21 she had a baby, or was pregnant, or had a relationship with  
22 him; two, his wealth or lack of wealth are also not  
23 relevant.

24 MR. PALMERONI: Your Honor, can I --

25 THE COURT: Yes.

1 MR. PALMERONI: I'm sorry, I don't want to be too  
2 long.

3 Mr. Occhifinto is N.V.E. N.V.E. is  
4 Mr. Occhifinto. The people that we have now putting forward  
5 things, Earling Jensen was not there when I worked there,  
6 was not there during any of this Ephedra and Mr. Occhifinto.  
7 So I am not arguing except that in terms of having  
8 Mr. Occhifinto on the stand and the jury being able to  
9 assess his character and veracity of what he's telling the  
10 jury --

11 THE COURT: I'm going to stop you right there.

12 MR. PALMERONI: Okay.

13 THE COURT: There are evidence rules, sir. You  
14 don't get to put in someone's character. There are rules  
15 about character evidence, and this does not go to character.  
16 The fact that somebody had a baby out of wedlock, the fact  
17 that someone is even -- let me finish. I'm going to say it.  
18 This is -- I'll read you 404(a):

19 "Character Evidence.

20 "Evidence of a person's character or character  
21 trait is not admissible -- " -- not admissible -- " -- to  
22 prove that on a particular occasion the person acted in  
23 accordance with the character or trait."

24 It's not admissible.

25 "Exceptions for a Defendant...in a Criminal Case.



1 "Exceptions for a Witness.

2 "Evidence of a witness' character may be  
3 admitted...", and that's where we get into prior wrongs and  
4 we get into crimes.

5 But you can't put in -- you can't just say he's a  
6 bad guy. You can't get up there and say he's a bum, he's a  
7 bad guy. You can't say it. It's not relevant, and I'm not  
8 going to allow you to do it. It's not a claim in the case.

9 You can cross-examine him, if you choose,  
10 consistent with the Rules of Evidence, to the extent that he  
11 says something that you believe is false, and you have a  
12 good-faith basis for saying so, you can cross-examine him on  
13 inconsistencies in any deposition or prior sworn statements.  
14 You can cross-examine him on inconsistencies in his  
15 courtroom testimony. But --

16 MR. ROSARBO: Your Honor -- go ahead, I'm sorry.

17 THE COURT: Here's what I'm not going to do. I'm  
18 not going to be the teacher on evidence. I'm going to make  
19 rulings. I'm going to make rulings on examples that are  
20 given to me.

21 So, Plaintiff's counsel has made a motion. I'm  
22 giving you the basis for my ruling, and when I make a  
23 ruling, that means that you cannot reference -- whatever I  
24 say, you can't reference at trial. If you do, you will be  
25 shut down on the witness stand on it. If you try to say it,

1 it will not bode well for you. Once I make a ruling, it  
2 governs this case.

3 I'm not going to help you develop what you can  
4 cross-examine Mr. Occhifinto on. That's up to you as  
5 pro ses, representing yourself, mindful of the Federal Rules  
6 of Evidence. If you try to cross-examine him on any of  
7 these topics, you will be shut down. I will instruct the  
8 witness not to answer, and I will admonish you, because I've  
9 already made a ruling on it.

10 If you go to some other area that isn't covered by  
11 any of these rulings, he'll object and I will say,  
12 sustained, don't answer the question, and that means you  
13 move on to another topic.

14 You don't fight with me. You don't argue with me.  
15 I make the rulings.

16 But what I'm not going to do is tell you what area  
17 you can or cannot go into. I'm going to tell you that  
18 issues like character and prior bad acts are discussed in  
19 the Rules of Evidence, and there's a body of case law that  
20 talks about it, and we're governed by law in the 3rd Circuit  
21 Court of Appeals and by the Supreme Court. That's what we  
22 do in Federal court.

23 All I'm going to do today is, I'm going to rule on  
24 what is in this motion.

25 The first one happened to be about his reference

1 to having had a child with Cosentino. I'm finding that is  
2 not relevant and doesn't fit into any other rule.

3 Reference to his wealth or his lack of wealth is  
4 not relevant.

5 And I'm going to move on. And I have your  
6 opposition. I hear you. I understand you're not lawyers.  
7 I want you to understand that these are my rulings, and in  
8 Federal Court, particularly now, but more so before the  
9 jury, do not argue with me. I make a ruling, you accept it,  
10 and you move on. And if I make any critical mistakes, any  
11 mistakes at all, you can take an appeal to the 3rd Circuit  
12 Court of Appeals, and if I'm wrong, they will fix it. But  
13 you're not going to be arguing with the Court in trial, and  
14 you're not going to argue with me today.

15 So I'm giving you a little bit of extra room  
16 because you are pro ses and you're representing yourselves.  
17 But his wealth is just not relevant.

18 MR. ROSARBO: I'm the last person that would argue  
19 with you, Your Honor. I don't want to argue with you.

20 THE COURT: Good.

21 MR. ROSARBO: Can I just say one thing?

22 THE COURT: Yes.

23 MR. ROSARBO: What about the meeting I had with  
24 him before any of this, and me being intimidated, and him  
25 including my wife and my daughter in this case?

1 THE COURT: So, listen: That's not something  
2 that's been briefed to me. I'm going to go through these  
3 motions. And when you testify, if you want to try to bring  
4 that out, I'll rule then whether I'm going to allow it under  
5 the Rules of Evidence.

6 MR. ROSARBO: Okay, Your Honor.

7 THE COURT: But I will tell you right now, things  
8 that happened after this case ended, things that happened in  
9 the workplace unrelated to these two schemes, things that  
10 happened years ago, none of that is coming in.

11 Now, a conversation you had with him right around  
12 the time of this lawsuit, that may be evidential, I don't  
13 know, but I'm not going to give opinions on it. I'm only  
14 going to do it when I hear the questions and I hear the  
15 proffer at the right time. Now is not the right time.

16 MR. ROSARBO: I understand, Your Honor. I only  
17 said it because I had to spend money to protect them from  
18 him, which they had nothing to do with the case whatsoever.

19 THE COURT: And that's not part of this case right  
20 now. Conversations you had with him at some point, either  
21 right before, during, or after this trial may or may not be  
22 evidential and relevant. I'll decide that at trial.

23 MR. ROSARBO: Okay, Your Honor. Thank you.

24 THE COURT: All right?

25 Allegations of N.V.E. hiring undocumented workers.

1           The immigration status of employees is not  
2 relevant to any claims or defense. It's out.

3           Testimony relating to N.V.E.'s trial in Michigan.

4           It looks like Mr. Palmeroni wants to introduce  
5 evidence that Occhifinto made an illegal offer to settle  
6 with him if he changed his testimony in an unrelated  
7 trademark infringement case filed against N.V.E. in  
8 Michigan.

9           Mr. Palmeroni?

10          MR. PALMERONI: Yes, Your Honor.

11          The Court should be aware that the complaint was  
12 only amended after my testimony in this case.

13          So, what happened was, I was subpoenaed by a law  
14 firm in Michigan, and I reported for the subpoena. My  
15 testimony was somewhat detrimental to N.V.E.'s case. I say  
16 "somewhat" because even the trial judge ruled that I had  
17 said some things that were -- could be construed as  
18 pro-N.V.E., I guess, and some things that were not  
19 pro-N.V.E.

20          However, he was being sued by a giant company, he  
21 eventually lost for \$12 million, and when that came up for  
22 case, we were here for settlement. I was approached by  
23 Mr. O'Connor and told that if I offered evidence against the  
24 rest of the people that were still in the case, and at that  
25 time, there was people from Texas, people from California,

1 and Mr. Rosarbo, if I changed my testimony in the Michigan  
2 case and if I gave them a million dollars, this would all go  
3 away. Okay?

4 That's relevant, because this case was brought --

5 THE COURT: Say that again. What was said to you?

6 MR. PALMERONI: Okay. So, what was said to me  
7 was, first of all, I had to present evidence against the  
8 remaining people in the -- still in this case, so that would  
9 be, at that time, it was Brand Distributing out of  
10 California, Sumicek out of Texas, Mr. Rosarbo. I would have  
11 to change my testimony in the Michigan case to be all  
12 positive for N.V.E. and make a long-term offer to sometime  
13 in the future come up with, whether it's payments or  
14 whatever, a million dollars. Okay?

15 I soundly rejected it, but, more than that, the  
16 reason it's relevant is, these amended charges were brought  
17 after my testimony came, and what they did was, they took my  
18 checkbook and all the stuff I turned over in discovery, and  
19 anybody I was dealing with, they brought into this case.  
20 That was the message. The message is, if you deal with me,  
21 I'm a bad guy, you're going to be dragged through the court.  
22 And chapter and verse, that's what happened. Not to  
23 mention, you know, my wife, my sister, et cetera, and, you  
24 know, Mr. Rosarbo mentioned his family. This was done after  
25 I testified against his interests in Michigan in a case that

1       they appealed for years and that they lost soundly. They  
2       finally went up against someone that had a billion dollars  
3       and was able to fight them, and I'm not able to do that, but  
4       I'm certainly not going to commit perjury for anyone.

5               The door was open. Mr. Basil was in the room, as  
6       well as the other Defendants.

7               THE COURT: Okay. So I am going to exclude that  
8       evidence under both 401 and 403, and primarily under 403.

9               403 empowers me to exclude evidence even if it was  
10       somehow relevant and probative on some kind of point, which  
11       I'm not sure it even is. It is outweighed by danger of  
12       unfair prejudice, confusion of issues, misleading the jury,  
13       or consideration of delay, waste of time, or needless  
14       presentation of cumulative evidence.

15              As I said, this case is about what happened here,  
16       and to open up the door to a whole other procedure that went  
17       on for years in Michigan would unduly delay this case.

18              And the motion is granted. It will be kept out of  
19       the case.

20              Next one, the suggestion that N.V.E. improperly  
21       marketed certain products.

22              The reference to Black Beauties and Yellow  
23       Jackets, that they named some of their products after street  
24       drugs, has no relevance, and that will be kept out of the  
25       case.

1           MR. PALMERONI: Your Honor. Your Honor, in this  
2 case, these are some of the items that were sold. They're  
3 saying they -- but of course, there's no records, but these  
4 were their marquee products, okay, and that goes to -- I  
5 feel it's very relevant, because the law was coming down on  
6 him. He was getting rid of these through Mr. Rosarbo. They  
7 tried to say it was Stacker 2 and all that. They don't have  
8 proof or records, nor does Mr. Rosarbo have proof or records  
9 of what was sold. But this was their biggest selling  
10 products -- these were their biggest selling products.

11           THE COURT: I'm granting the motion. I will --  
12 there will be some latitude at trial -- is that the official  
13 name of the product?

14           MR. SAMARO: So, it was the official name of  
15 several of the products. As far as I know, Judge, none of  
16 these were involved in the overseas diversion things.

17           THE COURT: So here's what I'm going to do. I'm  
18 going to withdraw what I just said. I'm going to wait to  
19 see what happens at trial. If these products are the  
20 official names of products that are reflected on records for  
21 the overseas sales, either the fraud or the kickbacks, I'll  
22 take it as I see it. I'm not going to -- I'm going to wait  
23 and see how the evidence comes in at trial as to various  
24 products through the Plaintiff's case. I'm going to hold  
25 off. I'm going to carry that motion until trial.



1           Mr. Rosarbo, I am very impressed that you take  
2           care of your disabled relatives, including your brother, and  
3           I mean that. Taking care of family members is the most  
4           important thing we do on this earth, and I'm glad you got to  
5           tell me about it, and I will accommodate that, because I  
6           think we are human before we are anything else in this  
7           world, and certainly being a brother is one of the greatest  
8           titles you can ever have in life.

9           But that information is not relevant to the case  
10          here, and the jury is not going to learn about your care for  
11          your disabled brother, because that injects sympathy for you  
12          and distracts from the true issues, which are the legal  
13          issues in this case. I'm not going to allow you to  
14          reference, anyone to reference that he cares for his  
15          disabled relative.

16          MR. ROSARBO: Your Honor, I understand that, and  
17          that's fine. I only want to say one thing.

18          The whole time that I was doing my deposition,  
19          Mr. O'Connor talked about my brother forever and a day, and  
20          now that I look back at it, it was his way of trying to  
21          soften me up so that I wouldn't say or do anything against  
22          them, and then now all of a sudden, I can't talk about my  
23          brother, because it was every day.

24          THE COURT: I hear you.

25          MR. ROSARBO: I understand. I agree with what

1       you're saying totally.

2               THE COURT:   Then sit down.   Thank you.

3               Next one, Defendant should not be permitted to  
4       testify about various matters concerning Jared Wheat.

5               This is what the brief says:   That Wheat is an  
6       ex-con that developed an herbal supplement called StaminaRX  
7       that was marketed as a substitute for Viagra.   N.V.E.  
8       manufactured this product for Wheat, and it was said to  
9       contain Tadalafil.   It was raided by the FDA.

10              So, what are we talking about here?

11              MR. PALMERONI:   Well, I can't speak for  
12       Mr. Rosarbo, but I'll take what I'm talking about, Your  
13       Honor.

14              This was -- this is endemic, or it's -- it  
15       characterizes what was going on and what's happening at  
16       N.V.E.   There was all kinds of stuff being made there that  
17       was then had to be got rid of, because at that time, the FDA  
18       came with guns drawn.   I was not in the office, Mr. Rosarbo  
19       was, as well as some other people.   I was at Eckerd in  
20       Florida.

21              That being said, that is another time where there  
22       was product that was being made that shouldn't have been  
23       made.   There is no proof of what -- I say Mr. Rosarbo  
24       because he handled the day-to-day, he got the product from  
25       N.V.E.   There is no proof of what product he was selling or

1 he was taking.

2 THE COURT: This goes back to the initial issues.  
3 We don't have the records. I get that. But whether or not  
4 Mr. Occhifinto was selling products that were about to be  
5 raided, that he was raided by the -- they were selling  
6 products that were illegal and shouldn't have been sold, how  
7 is that relevant to the claims in this case?

8 MR. PALMERONI: Because Mr. Occhifinto in his  
9 deposition testified that they never made a mistake on any  
10 labeling, that there was never any seconds, that there was  
11 never anything he had to get rid of. So that directly  
12 impeaches his testimony, because there were things that were  
13 -- he was manufacturing at one point and then had to get rid  
14 of at another point. There were things that he was making  
15 wrong. The FDA brought -- brought action against him for  
16 these things he wasn't supposed to be making. He would  
17 never take a loss on anything. So those things went out the  
18 back door.

19 THE COURT: Let me stop you for a minute.

20 If he said under testimony that, I never did  
21 anything, I didn't make anything wrong, I didn't do anything  
22 wrong, you may be able to ask him that on cross-examination:  
23 Isn't it true that you did sell product that didn't pass the  
24 FDA?

25 MR. PALMERONI: That's all I'm asking, Your Honor.

1 THE COURT: But that's different than putting in  
2 affirmative proof, and that's only because you have a  
3 good-faith basis to believe that he did something, he wasn't  
4 truthful at his deposition, in his sworn statement. I will  
5 allow that. But I'm not going to let you put in information  
6 about this whole scheme with this guy named Jared Wheat and  
7 the FDA and everything else.

8 MR. PALMERONI: And, Your Honor, I'm not asking  
9 for that --

10 THE COURT: If he said at his deposition, we were  
11 never investigated by the FDA, they never came and talked to  
12 me, and, in fact, they did, you can ask him about that.

13 But that's not what this motion is about. This  
14 motion is about, you're not going to put in affirmative  
15 evidence about Wheat being an ex-con and selling him a  
16 herbal supplement that was manufactured that had an illegal  
17 substance in it and he was investigated by the FDA.

18 MR. PALMERONI: Forgive me, Your Honor. I don't  
19 understand the difference between affirmative -- what you're  
20 saying is what I'm looking at.

21 THE COURT: Here is what affirmative is.  
22 Affirmative is when you take that witness stand and you tell  
23 your story to the jury, you can't say, not only -- this is  
24 what you guys can't do. You can't say, there was no --  
25 let's put it this way. You can talk about what happened

1 with respect to the distribution scheme and the fraud  
2 scheme. You can't say things like, Mr. Occhifinto had a  
3 relationship with a coworker and had a baby; Mr. Occhifinto  
4 was involved in this Michigan lawsuit, and this is what  
5 happened to me. You cannot say that he had undocumented  
6 workers in the company, that this was a crummy company, and  
7 all these other wrongs that were going on.

8 If Mr. Occhifinto takes the witness stand, you may  
9 be able to cross-examine him if he says something contrary  
10 to what he said in his deposition. That's impeachment. And  
11 I will help you with that. That's to impeach his  
12 credibility.

13 MR. PALMERONI: And that's all I'm looking for,  
14 Your Honor.

15 THE COURT: Well, this is not your motion, it's  
16 their motion. That's what I'm ruling on.

17 So Mr. Samaro is saying he wants to preclude you  
18 from talking about this whole scheme, alleged scheme with  
19 Jared Wheat and the FDA investigation.

20 MR. PALMERONI: But when you say preclude me, it  
21 sounds almost like I can't state my case as far as to show  
22 how products were being made that were seconds, that were  
23 overruns, that were illegal or whatever.

24 THE COURT: All right. Let me stop you for a  
25 minute.

1                   Products that were illegal, that were overruns,  
2                   that were seconds; how is that relevant to his claim in this  
3                   case that, again, you --

4                   MR. PALMERONI: Because Mr. Rosarbo told me that's  
5                   what he was selling. That's what he wanted the initial  
6                   investment for. I've said that since the beginning of the  
7                   case.

8                   THE COURT: But to the extent that he -- so where  
9                   did he get those from?

10                  MR. PALMERONI: Mr. Occhifinto. They couldn't be  
11                  sold anyplace else, is my point, Your Honor. So he made a  
12                  profit on them instead of throwing them in the garbage,  
13                  because they don't have the records of what went out or what  
14                  -- he doesn't have the records, but I'm supposed to be told  
15                  that I don't --

16                  THE COURT: So your defense is that Mr. Occhifinto  
17                  gave Mr. Rosarbo bad drugs, expired, seconds --

18                  MR. PALMERONI: Absolutely.

19                  THE COURT: -- and told him, gave him permission  
20                  to sell those to his clients.

21                  MR. PALMERONI: That's correct. He paid him cash  
22                  up front.

23                  THE COURT: Mr. Samaro?

24                  MR. SAMARO: It's directly contradicted by  
25                  Mr. Rosarbo in his deposition.

1 THE COURT: But that doesn't mean I'm going to  
2 stop him from saying it now.

3 MR. SAMARO: No, fine.

4 THE COURT: He can cross-examine on it. If his  
5 defense is --

6 I will give you a little bit of latitude. If your  
7 defense is, Mr. Occhifinto and I had an agreement that he  
8 would give me seconds and expired Stacker 2-like products  
9 and he was totally on board with me selling them through  
10 this company, if you want to say that, that is your defense,  
11 I'll let you say that. But it's going to be contradicted by  
12 -- he's going to cross-examine you on it, so, yes.

13 But I'm not going to let you get into there were  
14 illegal immigrants and there were pregnant women and there  
15 was a --

16 MR. ROSARBO: That's fine, Your Honor. I  
17 understand where you're coming from. That's fine.

18 THE COURT: If your defense is, I wasn't stealing  
19 from the company, I had a deal with Mr. Occhifinto to sell  
20 seconds and expired drugs that he couldn't get rid of  
21 because of the FDA coming in and taking Ephedra off the  
22 market, and he allowed me to do this, you can say that.

23 MR. ROSARBO: Thank you.

24 THE COURT: But you do it at your own risk.  
25 Understand that, according to Mr. Samaro, you told a very

1 different story at your deposition, and there may be some  
2 paper trail that contradicts that.

3 MR. ROSARBO: I understand that, Your Honor.

4 THE COURT: All right.

5 MR. ROSARBO: That's fine.

6 THE COURT: All right.

7 The last one is, the Court should preclude  
8 Defendants from referencing N.V.E.'s application to the DEA  
9 or the denial of that application.

10 What's that about?

11 "Through Occhifinto's deposition, Palmeroni's  
12 counsel questioned him about N.V.E.'s application to the DEA  
13 to sell pseudoephedrine. The fact that N.V.E. applied to  
14 the DEA for license to sell pseudoephedrine while Occhifinto  
15 was in prison is not relevant."

16 So what are you looking to keep out here,  
17 Mr. Samaro?

18 MR. SAMARO: Anything about that story, that  
19 N.V.E. was denied a license to sell this product, because it  
20 has no relevance to this case at all. And that product has  
21 nothing to do with any --

22 THE COURT: Well, when did that happen?

23 MR. SAMARO: This is '96 or earlier, when he's  
24 still in jail.

25 THE COURT: What's the relevance?



1           MR. PALMERONI: The only relevance, Your Honor,  
2           is, it's a pattern of sidestepping the rules, sidestepping  
3           the rules, sidestepping the rules. While he's in prison, he  
4           puts in something to the DEA. The DEA rejects and finds  
5           that he lied in his submission. So, while it may not be  
6           relevant that he was in jail, their findings are relevant in  
7           that -- I mean, the jail is the time period, but this was  
8           two years before he says I started working for him, and the  
9           final ruling came a month before I started working for him,  
10          or in that time frame, and the DEA said he lied in his  
11          application. That's the relevant part. Whether it happened  
12          when he was in prison or not, that, I mean, that's just the  
13          context of what had happened.

14          THE COURT: I'm keeping out the FDA, and keeping  
15          out him being in prison. If there's any relevance that  
16          comes up at trial about the license - I doubt it - I'll hear  
17          it, but you can tell me in advance of testifying. But no  
18          reference to being in prison, and no reference to his making  
19          that application 10 years before this whole scheme. I'm  
20          inclined to keep the whole thing out.

21                 So, let's go back to convictions, and let me tell  
22          you what the rule is.

23                 There's a rule that addresses specifically whether  
24          prior convictions can be admitted at trial, and it's  
25          Evidence Rule 609, and this is what it says.

1           In general, the limitation is -- if it's more than  
2   10 years old, it's only admissible if its probative value  
3   substantially outweighs its prejudicial effect, and that's  
4   the standard here.

5           So, both of these convictions were from a long  
6   time ago.

7           Mr. Samaro, I don't know, there was one for  
8   Occhifinto in '91 for sale of hash, and I know that he was  
9   convicted of money laundering and released from prison in  
10   1997, and that is way more than 10 years since today at  
11   trial, it's more than 20 years since those events occurred.

12          The rule precludes admission of evidence unless a  
13   conviction is more than 10 years old unless its probative  
14   value substantially outweighs its prejudice.

15          The advisory note says it is intended that  
16   convictions over 10 years old will rarely be admitted, only  
17   in exceptional circumstances.

18          I should also note here that I know Mr. Rosarbo  
19   has a prior conviction. Does Mr. Palmeroni?

20          MR. PALMERONI: Yes, I do, Your Honor.

21          THE COURT: And here's what I'm inclined to do:  
22   I'm inclined to keep out all prior convictions. They're all  
23   more than 10 years old, none of them are relevant, and no  
24   one has convinced me that, especially for drugs, the three  
25   that are for drugs would be relevant.

1           The money laundering is a closer call because  
2 prior crimes that involved a dishonest act or false  
3 statement are always admissible, at least on  
4 cross-examination of a party.

5           I haven't seen any law that says that money  
6 laundering falls within that, and I've seen cases to the  
7 contrary. If I'm convinced between now and court that that  
8 is not the case, I'll reconsider that.

9           But as of right now, I'm not satisfied that,  
10 convinced that anyone's conviction should come in. They're  
11 all long ago, they're all dated, and it's a high burden to  
12 convince me when the law says substantially outweighs its  
13 prejudice. It's very prejudicial to hear that there have  
14 been prior convictions. There are drug sentencings, drug  
15 convictions.

16           I take it -- I know from Mr. Rosarbo, I'm not sure  
17 about Mr. Palmeroni, but I'll let you be heard on it before  
18 I make my final ruling.

19           MR. PALMERONI: The only thing I have to say, Your  
20 Honor, is, as far as the 10-year part, because this case has  
21 stretched out 13 years, I don't think that was in the spirit  
22 of what they were talking about.

23           He is saying that in '99, I did this; 2000, I did  
24 this. He was released from prison in '96, when the 10 years  
25 starts, even if he was convicted in '94. So I don't think

1       this falls within that. If this case went on another 15  
2       years, this gentleman is bringing a case, saying, this  
3       happened at this time, okay? That's what he's saying. So  
4       just because the case stretches --

5               THE COURT: That's your interpretation of the  
6       rule. The rule doesn't say that. It's not 10 years from  
7       the time of the events that give rise to the lawsuit; it's  
8       10 years from the time of trial. And it's more than 10  
9       years. That's the rule.

10              So, it's a good ruling, because your conviction  
11       gets kept out as well.

12              MR. PALMERONI: Your Honor, I was convicted at 19  
13       years old, and it was for marijuana, and if we need to bring  
14       that in in order to bring --

15              THE COURT: It's out. It's completely out. It's  
16       out. It's not even close.

17              MR. SAMARO: I just wanted to say, Your Honor,  
18       that we also moved to exclude the prior criminal history of  
19       a fellow by the name of Art Prindle, who is a witness in the  
20       case, and it's in our papers. And his conviction is also  
21       for drugs, hashish or something, and it's also more than 20  
22       years old.

23              THE COURT: The same rule will apply to everyone,  
24       unless I'm convinced otherwise, and unless there's some  
25       change at trial.

1 I think I made clear that the counterclaim  
2 evidence is out.

3 And in terms of, like I said, to the extent that  
4 -- I'm going to allow you some room on your defense, and  
5 your defense is, Mr. Occhifinto was well aware, was selling  
6 me secondary and expired product, and that was what we were  
7 selling, I will allow you to go into that.

8 If there are any other issues that you need me to  
9 address as you prepare for trial, we're going to talk about  
10 it again when we have our conference call -- what date is  
11 it, on February 24th? No, we're talking on March 10th,  
12 correct?

13 Do you want to do it in person on March 10th? Or  
14 no? You tell me.

15 MR. PALMERONI: For me, phone would be better,  
16 Your Honor.

17 THE COURT: We'll do it by phone, then. All  
18 right? Because we're going to talk about the trial date,  
19 and if there are any other evidence rulings that you want to  
20 address, I need to know in advance, and you've got to send  
21 me a letter. But I expect to talk about the trial date.

22 I also expect to talk about the protocol for  
23 direct examination of the co-defendants. It may be --  
24 you're going to have a joint -- right? You're both going to  
25 be pro se? No?

1 MR. PALMERONI: We're both pro se, but we're not  
2 joined in any way, shape or form, Your Honor.

3 THE COURT: Okay.

4 MR. PALMERONI: He's only on part of the suit.  
5 He's not even part of the kickback scheme. And he's  
6 introduced stuff against my interest.

7 THE COURT: Got it. I hear you.

8 So, if you want to send me a submission before  
9 March 10th about how you wish to proceed, you can do so.  
10 We'll talk about it on March 10th. Mr. Samaro can submit  
11 something to me as well, meaning how you're going to tell  
12 your story to the jury. How you are cross-examined by  
13 Mr. Samaro will be based on -- he's a lawyer. He will  
14 cross-examine you consistent with the Rules of Evidence, and  
15 I will jump in if I believe that he is crossing a line.

16 And when you cross-examine witnesses, I will give  
17 you some latitude because you're pro se, but you're going to  
18 have to ask leading questions on cross-examination, which  
19 means questions that suggest an answer, but I'll give you a  
20 little bit of latitude on that because you are a pro se.

21 But the difficult part is your direct of yourself,  
22 because, as I said, I'm not inclined to have you just do a  
23 full narrative. I may ask you to think about giving written  
24 questions in advance, either I can ask you or my staff can  
25 ask you or you can ask yourself, so that there is some

1 organization to your direct examination, and it will also  
2 help guide you for you to tell your story as a Defendant.  
3 And if there's something as you want to tell your story and  
4 you write out the questions, which you should do before we  
5 meet again on March 10th, and there's an area that you think  
6 you want a ruling from me about, can I go into this or can I  
7 go into that, that will prompt you to think about it, and  
8 you can raise that with me and explain to me why it may be  
9 relevant and why you should be able to explain something.  
10 You can't talk about the baby, you can't talk about the  
11 alleged illegal hires, but there may be some other issues  
12 relating to Mr. Occhifinto that you may want to raise or a  
13 story you may want to tell, and you can ask me for a ruling  
14 about that on March 10th. You can ask me any time; you can  
15 do it at the end of the day, before the day begins, because  
16 my goal at trial is to make sure it goes as smoothly as  
17 possible for the jury and they don't get bogged down in a  
18 lot of conferences and a lot of objections, because then  
19 they are not, you know, they're not going to be happy, and I  
20 want to, you know, keep their volunteer time to a minimum.

21 Do you have any sense, Mr. Samaro, how many  
22 witnesses you're going to have?

23 MR. SAMARO: Probably in the nature of -- I should  
24 say in the realm of five. Depends on what happens.

25 THE COURT: Okay. Do you have any sense of how

1 many trial days you'll need?

2 MR. SAMARO: So we talked about this being a  
3 10-day trial total. I think that's probably -- probably  
4 longer than we need.

5 THE COURT: Okay.

6 MR. SAMARO: But, you know, it's a fairly  
7 complicated case.

8 THE COURT: Okay. So here are some other things  
9 I'm going to need from you.

10 I need a neutral statement of the case. You can  
11 send it to your adversaries. A neutral statement is  
12 something we read to the jury to tell them, this is a case  
13 in which N.V.E. and Occhifinto allege X, Y, and Z;  
14 Defendants deny the charges. Very simple, so we can read it  
15 to the jury, in case they know any of you personally, they  
16 heard of the drug, you know, they were in litigation against  
17 the company - something that would prevent them from serving  
18 impartially as a juror.

19 So I need a very short statement. You can send it  
20 to them.

21 I also need before trial -- you can get that to me  
22 before the March 10th conference call.

23 I also need jury instructions, and if you could  
24 get those to me, and, of course, send a copy to Mr. Rosarbo  
25 and Mr. Palmeroni.



1                   And there's a third thing I need: A copy of all  
2 exhibits you're going to use, and expert reports, and that  
3 goes for Defendants.

4                   Are there any exhibits you're going to be using  
5 and entering at trial?

6                   MR. PALMERONI: There are a few, Your Honor.

7                   THE COURT: So make copies.

8                   MR. PALMERONI: Um-h'm.

9                   THE COURT: Have them ready. There only can be  
10 ones that were identified in the final pretrial order, and  
11 make copies -- come to trial with a copy for the Court, a  
12 copy for the Court Reporter, and a copy for Mr. Samaro, and  
13 one for yourselves. You should have four copies of every  
14 document. If he already has the document in his list --  
15 he's going to give me an exhibit book by the 10th and have  
16 them sent over. If they're already in exhibit books, you  
17 can just use those as exhibits. You don't have to have your  
18 own exhibits.

19                   If they're going to move an exhibit in and it's in  
20 your book, I'll allow them to use it, as long as they've  
21 identified them as exhibits.

22                   I think that's it.

23                   Is there anything else?

24                   MR. SAMARO: Well, Your Honor, so, you talked  
25 before about us sending you the deposition pages that we

1 intend to use. Would you like page and line before March  
2 10?

3 THE COURT: I'd like to actually see the pages.  
4 You're going to need the pages anyway for trial, --

5 MR. SAMARO: Right.

6 THE COURT: -- so you might as well just give me  
7 the pages with the cover letter, saying, here are the  
8 following pages, and list them, and actually give me the  
9 actual pages. Given that we have pro ses on the other side  
10 and you're reading in a party deposition, I want to see the  
11 exact pages.

12 MR. SAMARO: Got it, Judge.

13 So, they also, especially Mr. Palmeroni, suggested  
14 they're planning to use deposition transcripts. Can they  
15 just tell us, deposition transcript of whomever? It would  
16 be helpful to us --

17 THE COURT: Sure.

18 MR. SAMARO: -- if we could have a page and line.

19 THE COURT: Are you going to be using any  
20 depositions?

21 MR. PALMERONI: Yes. Yes, Your Honor.

22 THE COURT: Of whom?

23 MR. PALMERONI: Of Occhifinto, of -- well, I mean,  
24 I have to -- I have to look at them again, but of  
25 Occhifinto, of myself, of Mr. Jensen, perhaps.

1           THE COURT: I need line and page numbers. This is  
2 what you have to do. You have to prepare for trial. March  
3 10th. If you don't submit to the Court -- we're going to do  
4 this in person on March 10th. There are too many issues  
5 now, and I want to make sure we're here to go over  
6 everything together. March 10th will be in person, unless  
7 Mr. Rosarbo cannot be here because of his brother.

8           MR. SAMARO: Is that going to be also at 4 p.m.,  
9 then?

10          THE COURT: That will be at 3 p.m. All right?  
11 I'll do an order that you'll get.

12          And by March 10th, you have to give me a list,  
13 because, if things go as planned, the trial will be in two  
14 weeks after that. I want a list mailed to the Court, just  
15 like you did the last time, of all the pages you wish to  
16 read in on depositions. It has to be relevant. Remember,  
17 you can call Mr. Occhifinto in your case if you want to. If  
18 you want to -- you may be allowed to use some or all of his  
19 deposition, or not all of it, and you can tell me what pages  
20 you want to read in. But I have to have a list of those so  
21 Mr. Samaro can look at them and decide whether he has any  
22 objections. All right?

23          MR. SAMARO: Your Honor, also, would you like a  
24 verdict form?

25          THE COURT: Yes. That was the other thing. I

1 need a verdict form. That goes hand-in-hand with the jury  
2 instructions.

3 MR. SAMARO: And the voir dire?

4 THE COURT: Yes, that's what I was thinking. I  
5 couldn't remember. Voir dire. I have the general voir dire  
6 questions, so I'll use the standard ones that I use in all  
7 my cases. If there are any additional ones that you think  
8 should be given in this case -- in other words, there are  
9 standard questions that I use to question the jury. We'll  
10 have jury selection first, it will probably take a day or  
11 two, and they will be asked questions: Do you know any of  
12 the witnesses; do you have -- you know, any questions that  
13 are designed to see if the witness has any bias. I'll ask  
14 them -- they'll hear your names, they'll see you, and if  
15 they know you personally. There may be some additional  
16 questions that you want to ask the jury that are relevant to  
17 bias. You can send those to me before March 10th as well.

18 MR. SAMARO: There was also a motion, Your Honor,  
19 to strike our expert, and that expert is an economist.

20 THE COURT: Yes.

21 MR. SAMARO: And also, a motion by Mr. Rosarbo to  
22 have his deposition stricken, and, finally, a motion to  
23 dismiss the entire case.

24 THE COURT: Okay. The motion to dismiss the case  
25 is denied for the reasons set forth in my summary judgment

1 opinion. It's going forward to trial.

2 In terms of the expert, I did take a look at  
3 N.V.E.'s expert. It's an economist.

4 I'll hear first from Mr. Samaro on that point.

5 MR. BOYAN: Thank you, Your Honor. I'm actually  
6 going to address this one.

7 THE COURT: Okay.

8 MR. BOYAN: And I just want to correct one thing.  
9 He's actually a forensic accountant, Mr. Neier.

10 THE COURT: Okay.

11 MR. BOYAN: And we have called Mr. Neier to offer  
12 expert testimony. We set forth the reasons in our  
13 opposition as to what things we're going to have  
14 Mr. Neier opine on in his testimony, and, you know, in  
15 summary, we believe that we can meet all three of the  
16 requirements of the Daubert standard.

17 The first would be, is Mr. Neier qualified to  
18 serve as an expert.

19 We feel that he is well qualified. We submitted a  
20 copy of his CV and also set forth a narrative of his  
21 experience in our opposition papers. He has significant  
22 experience. He worked for the Morris County Prosecutor's  
23 Office for a long career, rising up in the ranks there.  
24 After that, he joined Sobel & Company, founding their  
25 litigation and forensic accounting practice there at Sobel.

1           He has obtained several degrees relating to  
2 forensic accounting and certifications. He has taught for  
3 the National White Collar Crime Institute, Seton Hall School  
4 of Business, N.Y.U. School of Law, several other places.

5           He has testified in other cases throughout  
6 New Jersey and in other locations. He's also testified in  
7 arbitration matters and before other panels and tribunals.

8           So he has lots of experience as a forensic  
9 accountant, and we believe that he is eminently qualified to  
10 serve as an expert in forensic accounting in this case.

11          Mr. Palmeroni doesn't dispute his qualifications  
12 in his motion to exclude Mr. Neier's testimony. He just  
13 notes that he has a long, a lengthy CV.

14          As to the second aspect of the Daubert standard,  
15 Mr. Neier's testimony is reliable. His testimony is  
16 reliable because he relied on the Defendants' own records to  
17 support the conclusions that he made. We obtained by  
18 subpoena bank records from the banks that the Defendants  
19 used, Bank of America, Lakeland Bank, several other banks,  
20 and obtained their statements for these companies that they  
21 set up, and went through all those. We also obtained copies  
22 of all the canceled checks that went through all those  
23 companies, and we obtained tax records from the companies  
24 and from Mr. Palmeroni individually. Mr. Neier took all  
25 that information from the Defendants and compiled it and

1 summarized it into a more understandable forum. He  
2 summarized the payments that were made to the Defendants'  
3 companies from these -- what we call conspiring brokers that  
4 were N.V.E.'s customers who were buying the product from the  
5 Defendants' companies at a lower price; we have, you know,  
6 volumes of checks from these companies. He has listed the  
7 amount that they paid to the Defendants' companies, and  
8 shows how much they received. He also shows how much they  
9 paid N.V.E. for this product that they were doing, and from  
10 that, he was able to calculate damages based on a  
11 disgorgement method of calculating damages. He looked at  
12 the total amount that the Defendants' companies paid to  
13 N.V.E. and the total amount that they received, and the  
14 difference between that is the profit.

15 THE COURT: So let me stop you for a minute.

16 I'm looking at his report on page 11 and 12.

17 MR. BOYAN: Yes, Your Honor.

18 THE COURT: And he talks about, it's not  
19 disgorgement as the remedy, it's the lost profit to N.V.E.

20 MR. BOYAN: He does reference lost profits in his  
21 report, Your Honor, but he also says that the primary -- to  
22 get later on into his conclusions, the primary method that  
23 he used, starting on page 17, there's a description of the  
24 economic damages. He says that he considered two separate  
25 economic theories, lost profits and what he calls unjust

1 enrichment or restitution, what we would refer to as  
2 disgorgement, and he says that, you know, while the lost  
3 profits may have, you know, provided another measure of  
4 damages, he's relying exclusively on restitution damages in  
5 this case because it's much more clearly supported by the  
6 records that we have.

7 The records for the restitution part of it are  
8 crystal clear. We have Defendants' own records, their bank  
9 statements, their checks, their tax returns. From that,  
10 there's really no dispute that neither of the Defendants  
11 have disputed the authenticity or accuracy of any of those  
12 records.

13 THE COURT: The records meaning how much money was  
14 in the account of their company.

15 MR. BOYAN: How much money was in?

16 THE COURT: Given to, was it Smart World (U.S.)?

17 MR. SAMARO: Smart World (U.S.), yes.

18 THE COURT: That's the disgorgement amount;  
19 correct?

20 MR. BOYAN: It's a little more complicated. They  
21 used several other companies as well. They used Smart World  
22 (U.S.) to purchase the product from N.V.E. because it was  
23 the same name as a company in the Netherlands, Smart World  
24 (Netherlands), but then they also used several other  
25 companies, American Wholesale Distributors and VAR, which



1 was Mr. Rosarbo's company, to receive the payments from the  
2 conspiring brokers. They didn't have the conspiring brokers  
3 pay Smart World (U.S.) directly, they had the conspiring  
4 brokers pay these other entities, and then the other  
5 entities were funneling --

6 THE COURT: Are you talking about -- I'm talking  
7 about the distribution scheme.

8 MR. BOYAN: This is the distribution scheme.

9 THE COURT: Okay.

10 MR. SAMARO: You're saying brokers. You mean  
11 distributors.

12 THE COURT: Yes.

13 MR. BOYAN: Distributors. I'm sorry.

14 THE COURT: That's okay.

15 MR. BOYAN: Sorry.

16 But the money would flow to these other entities,  
17 VAR and AWD, from the distributors, who were buying this  
18 product from the Defendants, and then they would funnel it  
19 back into Smart World (U.S.) so Smart World (U.S.) could  
20 continue to buy more products from N.V.E.

21 THE COURT: From N.V.E., or from N.V.E. Europe?

22 MR. BOYAN: There is no N.V.E. Europe. They were  
23 buying them from N.V.E. and saying that the products were  
24 being shipped to Europe, where they were actually just being  
25 shipped to a warehouse.

1 THE COURT: Got it.

2 MR. BOYAN: His records also show the bribes that  
3 they were paying to the people who actually ran Smart World  
4 (Netherlands), that as part of this scheme, in order to use  
5 Smart World's name and to continue the scheme, they had to  
6 pay bribes to Smart World (Netherlands), and they showed  
7 wire payments to another company owned by the actual owners  
8 of Smart World (Netherlands), TNJ Limited, and they were  
9 wiring money to their account in Gibraltar to basically keep  
10 them happy so they would not report on this scheme back to  
11 N.V.E., and they wired large sums of money to this TNJ  
12 Limited. Mr. Neier talks about that in his report as  
13 further evidence of this scheme.

14 THE COURT: So let me ask you about the -- I get  
15 the disgorgement theory, but we go back to the lost profit  
16 theory for the distribution scheme, and on page 10, the  
17 expert says, "In document production, we identified 27  
18 invoices from 2005 to 2007." So he only has a two-year  
19 period, and then he said, on page 11, "The only Smart World  
20 (U.S.) invoice available to us from '05 to '07 was Smart  
21 World was purchasing Stacker 2 and 3 Ephedra-free products  
22 from N.V.E. In early 2004, Ephedra was banned in the United  
23 States. While we were not provided with Smart World (U.S.)  
24 invoices prior to '05, we did receive copies of domestic  
25 distributor invoices from 2002 to '3, which indicate that

1 N.V.E. was selling Stacker 2 and 3 with Ephedra count  
2 bottles for 3.77, the same price that Stacker 2 and 3 was  
3 out of Ephedra."

4 So, how does he know the quantity that was sold?  
5 In other words, he has random invoices, and he has -- since  
6 they're random, he only has a handful that -- how do we know  
7 that that invoice indicates a constant price?

8 On page 12, the second paragraph, he states: "We  
9 determined that from '01 to '03, the market between the  
10 international and domestic prices was 91 percent. Because  
11 of the average of the pre-Ephreda ban and the post-Ephreda  
12 ban rate, we determined it should have been paid for  
13 products."

14 So how do you come up to that amount? In other  
15 words, he doesn't know how much of the product was sold. He  
16 has random invoices over the 2005 to '07 period. He has  
17 invoices for -- 27 invoices, and from that, how does he get  
18 how many were actually sold?

19 MR. BOYAN: We're not relying on that information.  
20 That is background. He was saying it as an example because  
21 there are incomplete records. Based on the records we did  
22 have, he wanted to show kind of average prices that things  
23 were --

24 THE COURT: But I'm looking at total.

25 Look at page 12. He has a table four. We know he

1 has records for '05, '06, and '07, he has random records,  
2 and he looks at what was actually paid and what was actually  
3 paid to N.V.E. and the payment at domestic rates.

4 How does he know -- if he only had random -- I  
5 understand the markup, and I understand the difference. How  
6 does he get the 524,016?

7 You'd only know that if you know the amount of  
8 product that was sold.

9 MR. BOYAN: Your Honor, yes, I think that they  
10 based it on the amounts that Smart World (U.S.) was paying  
11 to N.V.E. for the products, so they -- I believe that he was  
12 -- we know that much, how much they were paying in checks to  
13 N.V.E., and he said --

14 THE COURT: Who was paying N.V.E.?

15 MR. BOYAN: Smart World (U.S.).

16 THE COURT: Was paying to N.V.E.

17 MR. BOYAN: N.V.E., yes, to purchase products. So  
18 if they said they bought \$100,000 of product, and based on  
19 the average price per bottle, he would say that that was  
20 roughly, you know, how much they would have been able to  
21 make on that same amount of product if it was sold at the  
22 actual price.

23 But, you know, but we're not relying on this as a  
24 lost-profit method of damages.

25 THE COURT: So why is it in here?

1                   MR. BOYAN: I think that it was for completeness.  
2                   We're not going to offer any opinion testimony from  
3                   Mr. Neier on that.

4                   THE COURT: So you're not relying on this at all.

5                   MR. BOYAN: Not the lost-profits theory as a  
6                   measure of damages.

7                   THE COURT: Are you relying on it for any other  
8                   purpose?

9                   MR. BOYAN: Relying on what for any other purpose?

10                  THE COURT: The lost profits.

11                  MR. BOYAN: I think we would generally introduce  
12                  evidence, it doesn't necessarily have to be through  
13                  Mr. Neier, that what some of the invoices show the product  
14                  was being sold for at that time, what the average price was  
15                  to domestic --

16                  THE COURT: To what end? In other words, you say,  
17                  we may want to use it like -- so you only get to testify at  
18                  trial on a damage theory that -- you don't get to testify  
19                  about anything in your report. So if he's only going to  
20                  testify at trial about a damage theory based on  
21                  disgorgement, the money that went into the U.S. company that  
22                  you got records on, what is the relevance of through this  
23                  witness putting in some random -- you can put it in through  
24                  Occhifinto, probably, as background, what he was selling  
25                  things for generally to understand the scheme, because you

1 have to educate the jury as to what the fraud was. The  
2 fraud was, you were buying it through this company that had  
3 the same name as the European company and then you were  
4 reselling it; right? So you could explain the scheme and  
5 you could show that through invoices, but I'm not sure  
6 you're going to get into it through the expert if he's only  
7 going to offer a disgorgement theory. Because, frankly, the  
8 lost-profit theory is a little bit -- is tenuous, because  
9 you don't have the documentation. You're making a lot of  
10 assumptions that are really not based on evidence.

11 MR. BOYAN: I understand, Your Honor, and, yes, we  
12 are proceeding on the disgorgement method, and I agree that  
13 we can get that evidence of pricing through fact witnesses,  
14 so it may not be necessary to get it through Mr. Neier. We  
15 can have him focus on calculation of damages and calculation  
16 of the amounts.

17 THE COURT: And I'll make one other point, and  
18 this is about opening the door, because once any witness is  
19 going to testify about 26 invoices, it opens the door to,  
20 where are all the other invoices, which you're going to have  
21 to explain anyway. I mean, there's no other way around it,  
22 unless you say, we're not going to mention anything about  
23 invoices. You can't explain the fraud without explaining  
24 the invoices. Once you explain 27 invoices, you open the  
25 door to, where are the other 5,000 invoices.

1           So it's in. Whether or not I allow an adverse  
2           inference doesn't really change the issue of that you're  
3           going to have to explain it, because it really goes to the  
4           scheme and why you don't have documents to show every bit of  
5           the scheme, and also if you want to get in those documents  
6           through your client.

7           So would I be correct in striking -- or you're  
8           withdrawing that part of your expert report that deals with  
9           lost profits?

10          MR. SAMARO: Absolutely, Your Honor, yes.

11          THE COURT: Okay. That simplifies a lot of things  
12          for trial.

13          And anything you want to -- because that was the  
14          only thing that gave me pause in this expert report, the  
15          lost profits.

16          And since that is now withdrawn, that they're only  
17          relying on disgorgement and profit, I'm satisfied that this  
18          expert preliminarily is sufficient under Daubert in terms of  
19          being reliable. He certainly has the credentials. It's  
20          reliable insofar as he looked at records of profit, and it  
21          has a fit to the damage theory in this case.

22          But I'll hear from either side, both Defendants,  
23          before I make a ruling.

24          MR. PALMERONI: All right. So if you'll allow me  
25          to ask the question, there are two theories, from what

1       you're telling me. One is lost profit, and one is  
2       disgorgement.

3               Lost profit is out.

4               Disgorgement would be -- would be -- the theory  
5       would be, they have to prove exactly what?

6               THE COURT: Disgorgement is an equitable remedy  
7       that says the person that received the value of the fraud  
8       should be disgorged of that amount.

9               MR. PALMERONI: Okay, and how do we assess --  
10       again, the records are incomplete. There's no Ephedra  
11       records. We have no records of what it was going to -- we  
12       have no records of how many items were sold, we have no  
13       records of what items were sold, and he says in here that he  
14       leaned a lot of it on testimony from -- or from dealing with  
15       Mr. Jensen, who was not there at the time.

16              THE COURT: Let me stop you for a minute.

17              MR. PALMERONI: Sure.

18              THE COURT: He is not going to testify about lost  
19       profits anymore. He is going to testify about disgorgement,  
20       meaning how much money went into Smart World and American  
21       Wholesale Distributors and VAR Consulting and NRGCC. That's  
22       on page 13 of the report. That's money that he says is  
23       ill-gotten gain of this fraudulent distribution scheme.  
24       That's his theory, and it's based on looking at those bank  
25       records, looking at the checks that went there, and assuming



1 that, making an assumption that those records are -- those  
2 checks that went to those four entities were ill-gotten gain  
3 from the distribution scheme.

4 You're correct, they don't have all of the  
5 invoices of the sales. But he's not looking for a  
6 difference between what the company would have made and what  
7 the company -- and the lost profits that it didn't make,  
8 because these profits were diverted elsewhere to these other  
9 four companies.

10 So, this, what you're really alleging is, what  
11 you're really saying is, the money that was in, for example,  
12 the 1,614,000 was not the result of this distribution  
13 scheme; this was a result of the fact that I was selling  
14 secondary and expired product with Mr. Occhifinto's consent,  
15 and that money went into Smart World. That goes to weight  
16 of the evidence, and you can cross-examine him on that and  
17 say, how do you know that that money was an ill-gotten gain?  
18 You can probe that topic. And that goes to credibility and  
19 weight. It doesn't go to admissibility.

20 Daubert means, does he have enough qualifications,  
21 is his methodology reliable enough that he can testify as an  
22 accounting forensic expert about the loss. I am satisfied  
23 that he does. But it doesn't mean that you can't  
24 cross-examine him at trial as to the veracity or the  
25 strength of his opinions, whatever your defense is. You

1 know what your defenses are. Whatever money that was in  
2 those accounts are not the product of ill-gotten gain,  
3 they're the product of something else. You can ask him  
4 about that. That's cross-examination. That's challenging  
5 the credibility of the witness' conclusions. But I'm going  
6 to let him testify as a threshold matter. All right?

7 MR. ROSARBO: Your Honor, I heard everything that  
8 he said. I have no problem with any of that, his  
9 qualifications, any of that.

10 The one thing that I believe is important in this  
11 case is, all of that makes sense if you have a product, like  
12 a Bayer aspirin, that's going to be sold forever. We were  
13 in a situation where this product was going to be closed in  
14 a very, very short time. Everybody knew about it, and all  
15 -- the only thing on Bob's mind was to get rid of all his  
16 Ephedra products.

17 THE COURT: Let me stop you, Mr. Rosarbo. I have  
18 to stop you, because we're not going to do this. I made a  
19 ruling, and it's done. I'm giving you a little bit of  
20 latitude because you're pro se. This is not how it works.  
21 The Court makes rulings, we move on. We don't then argue  
22 it. I gave you the reasoning.

23 You have a different theory. Your theory is, we  
24 weren't doing this, we didn't set up a company with the same  
25 exact name called -- whatever the --

1                   What was the U.S. company that they allege?

2                   MR. BOYAN:   Smart World (U.S.).

3                   THE COURT:   Smart World (U.S.).   Their whole  
4                   theory is, you set up Smart World (U.S.) as a fraud.   In  
5                   other words, you were buying it -- to Mr. Occhifinto's mind,  
6                   it was going to the European company at a lower price, and  
7                   then you were selling it to their customers, and so he lost  
8                   the sales and you got rich.   That's his theory:   You duped  
9                   us.

10                  If your answer is, I didn't dupe you, I didn't  
11                  defraud you, I was with you selling seconds and expired  
12                  products at a discount, and you knew about it, and we were  
13                  in that together, that's a valid defense, and you can ask  
14                  him about that.

15                  MR. ROSARBO:   I can say that?

16                  THE COURT:   You can.   I said that.

17                  MR. ROSARBO:   All right.   I'm sorry.   Okay.

18                  THE COURT:   And I'll give you more -- and that's  
19                  your defense.   But they're going to put on the theory that  
20                  you defrauded them.

21                  MR. ROSARBO:   That's fine.

22                  THE COURT:   And that's how the case is going to  
23                  go.

24                  MR. ROSARBO:   Okay.

25                  THE COURT:   You'll be able to put in -- and I've

1       said that already. But I'll give you a chance to be heard  
2       in court.

3               When I make a ruling, it's over, and we move to  
4       the next issue.

5               MR. ROSARBO: All right.

6               THE COURT: There's an issue about your  
7       deposition. You want it stricken, the whole deposition.

8               MR. ROSARBO: Well, I never got to see the whole  
9       -- I was under the impression that after my deposition, I  
10      had a certain amount of time to see the deposition, and if  
11      there was something there that I didn't agree with, I could  
12      have explained that, or counteracted it, let's put it that  
13      way.

14              I never got to see my deposition until -- I don't  
15      even know when I got to see it, and the trial was -- I mean,  
16      not trial --

17              THE COURT: When was your deposition taken?

18              Here's what you can't do. You can't change your  
19      deposition transcript. You're allowed to correct a  
20      typographical or an inaccuracy that the reporter is taking  
21      down. If you said, my name is Vincent P. Rosarbo, and they  
22      only put Vincent Rosarbo, you could say, I said P, I want it  
23      put in, and maybe the Court Reporter missed it. I live at  
24      50 Main Street, and he put 500 Main Street; that's a  
25      correction. If he took down an answer wrong or you asked

1 the question wrong, you can ask that your notation be  
2 attached to the deposition. It's not an opportunity to  
3 change your deposition testimony, it just isn't. It's to  
4 correct a mistake, like a mistake that the Court Reporter  
5 made in taking down your information.

6 MR. ROSARBO: I guess what I'm trying to say is,  
7 am I going to be allowed to say that I had meetings with him  
8 before the deposition, and I was intimidated, nervous,  
9 scared, whatever, naive? Am I going to be allowed to say  
10 that so the jury understands exactly where my head was at  
11 during that time? Because that's what happened.

12 THE COURT: So, Mr. Samaro, I'm sure if he wants  
13 to say that, he can say that.

14 MR. SAMARO: Your Honor, it's fine with me. If he  
15 wants to say that it wasn't his real testimony because he  
16 was coerced somehow, that sounds fair to me.

17 But it's why I think in this particular case  
18 especially that we're interested in showing the jury the  
19 whole deposition, not everything, but a lot of it, because,  
20 when you read the text, you'll never believe what he's  
21 saying right now. He fights back and, you know, it's just  
22 not the testimony of somebody going through that. So he can  
23 say that --

24 THE COURT: I'm sorry, when was he fighting back?  
25 At the deposition?

1 MR. SAMARO: Yes. So at these depositions, the  
2 first day was -- was calmer than the other days, but he was  
3 not at all cowed or acting coerced or toeing the party line  
4 or anything like that. This was the testimony -- and in the  
5 beginning, he was specifically asked, you're not here with a  
6 lawyer today; do you think you need a lawyer? You're  
7 voluntarily deciding to go forward anyway.

8 THE COURT: I hear you.

9 MR. ROSARBO: I don't remember that. I'm sorry,  
10 Your Honor.

11 THE COURT: What I need to do is, before -- I'm  
12 going to hold on it. I want the deposition transcript of  
13 Mr. Rosarbo.

14 Mr. Rosarbo, this is an issue that's been raised.

15 MR. ROSARBO: Just one thing, Your Honor. He  
16 wasn't at the deposition.

17 MR. PALMERONI: He wasn't even at the deposition.

18 MR. ROSARBO: So I don't know how he can say that.

19 MR. SAMARO: I have the transcript.

20 MR. ROSARBO: But he's talking about my mood, my  
21 this, my that. He wasn't there. He didn't see anything  
22 like that. He's just going by words. That's all. He can  
23 make a story about anything in words.

24 THE COURT: Do you have a copy of it?

25 MR. SAMARO: We filed it, Judge, with these

1 motions.

2 THE COURT: The whole deposition, all pages?

3 MR. SAMARO: Yes. All pages.

4 THE COURT: All right. So here's what I'm going  
5 to ask you to do. Can you provide them a copy of the  
6 deposition?

7 MR. SAMARO: Of course, Judge.

8 THE COURT: Do you have a copy of your deposition?

9 MR. ROSARBO: Yes I do, Your Honor.

10 THE COURT: You have it. I'm going to read yours,  
11 and I'm going to revisit this issue after I read it in  
12 detail.

13 Certainly you can say, I was coerced; I was  
14 intimidated; he was my boss, I worked for him, and I was  
15 nervous, and he put a lot of pressure on me, and he  
16 intimidated me.

17 What you can't say is, and he was a criminal, and  
18 I thought he was going to hurt my family.

19 You can say, I was worried about -- you know, if  
20 he made the threat to you at any time, that's a truthful  
21 statement, if you want to say it under oath, you can, but  
22 what you can't do is violate any of my other rulings. You  
23 can't say, he had a baby out of wedlock; he was a bad guy;  
24 he hired illegal aliens, and he had a criminal record.

25 MR. ROSARBO: I understand, Your Honor.

1           THE COURT: If you want to truthfully say that he  
2 threatened you, and that's your truth, and you're going to  
3 say it under oath with your hand on the bible or under  
4 affirmation, you can say that, and I'll give you room to  
5 explain if you want to -- if you are now going to say you  
6 didn't give truthful testimony at your deposition.

7           But the jury will see your deposition. If you're  
8 going to disavow the whole deposition, they probably will  
9 see the whole deposition, and they're going to hear how you  
10 testify into court.

11          MR. ROSARBO: That's fine, Your Honor.

12          THE COURT: So that's the general ruling that I  
13 will tell you.

14          MR. ROSARBO: That's fine. That's fine, Your  
15 Honor.

16          THE COURT: All right. Anything further?

17          MR. SAMARO: Not on our side, Your Honor. Thank  
18 you.

19          THE COURT: So, before our meeting, which is going  
20 to be in person in March, we still have a couple of things  
21 to get ready for.

22          Last, Mr. Rosarbo has a personal issue with his  
23 brother, and he will send me a letter or call at least a day  
24 or two before, and we'll do it on a day that works.

25          But I expect to get the protocol for the direct



1 exam.

2 I ask Mr. Samaro to get jury instructions, the  
3 neutral statement, and the voir dire questions to your  
4 adversary in advance of March 10th, or you can bring them to  
5 court on March 10th, and a copy of the exhibit books, and  
6 then we will -- I'm trying to think. Is there anything --  
7 you know what? I've changed my mind again. We're going to  
8 do it by phone on March 10th. You can submit all these  
9 things to me in advance; no reason to bring everyone in. We  
10 can talk about the protocol for the direct exam right before  
11 we start trial.

12 All right.

13 MR. SAMARO: Your Honor, we would also do a trial  
14 brief to support the jury charges, and the pretrial order  
15 suggests or has a deadline for supplying that. Would you  
16 like one as well?

17 THE COURT: Yes. March 10th, if you want to give  
18 me a trial brief. I don't really need it, but it's always  
19 welcome.

20 MR. PALMERONI: Your Honor.

21 THE COURT: March 10th, by phone, and Mr. Samaro  
22 will initiate the call. So before leaving, give him a copy  
23 with your phone numbers.

24 THE COURT CLERK: What time, Judge?

25 THE COURT: Three o'clock.

1                   Yes.

2                   MR. PALMERONI: Just so I have clarity, my motion  
3 to dismiss, it was dismissed on what authority?

4                   THE COURT: I granted the summary judgment motion,  
5 and once I granted summary judgment and found that there was  
6 a fact issue, it's inappropriate until the end of the  
7 Plaintiff's case to make a motion to dismiss the case.  
8 There's no authority for it. I found that there was a fact  
9 issue.

10                  MR. PALMERONI: Okay, because I had gone into  
11 jurisdiction.

12                  THE COURT: Remind me what the issue was.

13                  MR. PALMERONI: When they brought the case, they  
14 had brought it under 1331, 1327, 1364, and these all had --

15                  THE COURT: I have the issue now. I'm sorry. I  
16 neglected to deal with your motion.

17                  You argued to the Court subject matter  
18 jurisdiction, and I know there's a RICO claim at some point,  
19 but, nonetheless, there still remains complete diversity  
20 among remaining parties. As such, the Court has subject  
21 matter jurisdiction. Plaintiff N.V.E. is a New Jersey  
22 corporation. Mr. Palmeroni is a domiciliary of  
23 Pennsylvania. Mr. Rosarbo is a domiciliary of Connecticut.

24                  And Mr. Occhipinto is a resident of New Jersey?

25                  MR. SAMARO: Yes.

1 THE COURT: Okay. So there's complete diversity.  
2 The amount in controversy exceeds \$75,000. To the extent  
3 that diversity did not exist at the time the complaint was  
4 filed, it is irrelevant.

5 The Supreme Court has explained that diversity  
6 defects can be cured by dismissal, can be cured by  
7 dismissal, does not destroy diversity. Here, Defendants  
8 that may have been New Jersey domiciliaries for diversity  
9 purposes have been dismissed, and only Palmeroni and Rosarbo  
10 remain, so there is diversity between the parties right  
11 now. All right?

12 Thank you.

13 MR. SAMARO: Thank you, Judge.

14 THE COURT: All right.

15 THE COURT CLERK: Court's in recess.

16 (Matter concluded)

17  
18 Pursuant to Section 753, Title 28, United States  
19 Code, the foregoing transcript is certified to be  
20 an accurate record as taken stenographically in  
21 the above entitled proceedings.

22  
23  
24 s/CHARLES P. McGUIRE, C.C.R.